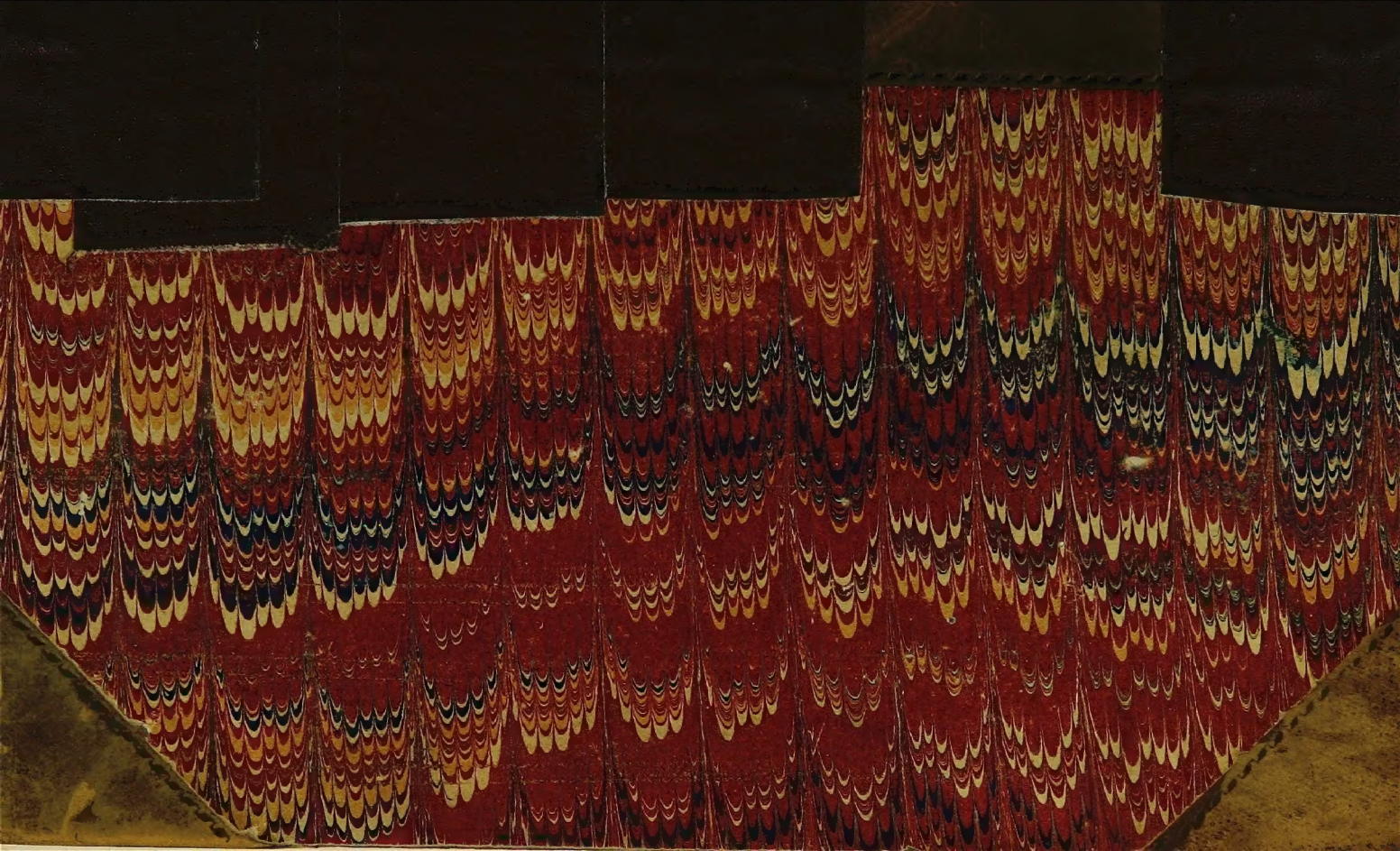

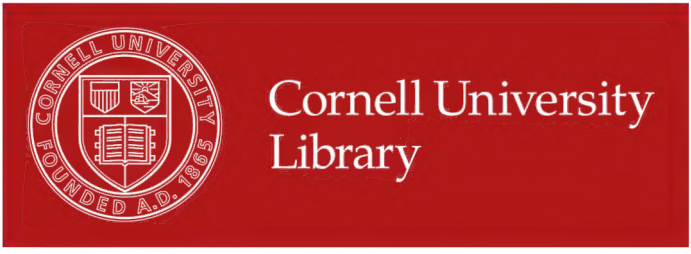

The Law

OF

CRIMINAL CONSPIRACIES

AND

AGREEMENTS.

BY

Robert Samuel

R. S. WRIGHT,

OF THE INNER TEMPLE, BARRISTER AT LAW,
FELLOW OF ORIEL COLL., OXFORD.

"Rather to . . . than . . by unprofitable subtlety, which corrupteth the sense of law, to reconcile contrarieties."—*Lord Bacon's Elements, Pref.*

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Her Majesty's Law Publishers.
HODGES, FOSTER & CO., GRAFTON STREET, DUBLIN.
CALCUTTA: THACKER, SPINK & CO. BOMBAY: THACKER, VINING & CO.
MELBOURNE: GEORGE ROBERTSON.
1873.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

CONTENTS.

SECTION I.

GENERAL HISTORY OF THE LAW OF CRIMINAL COMBINATIONS.

SECTION II.

THE KINDS (OR PURPOSES) OF CRIMINAL COMBINATIONS.

SECTION III.

THE ACT OF COMBINATION.

Conspiracies and Agreements.

SECTION I.

General History of the Law of Criminal Combinations.

Preliminary Notes.

[1. References to the cases on conspiracy are made in the text by date and name, without the addition of the books in which the cases are reported. A chronological list of cases will be found in Appendix III.; and also an alphabetical list with the references. Some important cases are set out in full or in part in Appendix II.

2. The word "ruled," as applied to a proposition of law for which a case is cited, is used to signify that the proposition was laid down by a judge acting on assize, or under a special commission, or at nisi prius, or at the Central Criminal Court, or at sessions. The word "held" is used to signify that the proposition was laid down by a judge or judges acting in banc or in a court of appeal.]

§ 1. *General History of Criminal Combinations.*

The history of the law of criminal conspiracies and combinations may be conveniently divided into three periods, of which the first ends with the sixteenth, and the second with the eighteenth century.

[1200—1600.] There appears to be no evidence that, during the first of these periods, any other crime of con-

spiracy or combination was known to the common law than that which was authoritatively and "finally" defined in A.D. 1305 by the Ordinance of Conspirators, 33 Edw. 1., as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds. During the reigns from that of Edward III. to the end of that of Elizabeth, various statutes were directed against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to disturb the markets or prices, and against combinations by masons and carpenters, by victuallers to raise prices, and by labourers to raise wages or alter hours; but no mention has been found in any of the writers, reports or abridgments of the period before the 17th century of any kind of conspiracy, confederation or combination, as being criminal at common law, except the crime of conspiracy as defined by the ordinance of 1305. The process by which this specific offence has been expanded into the comprehensive title of conspiracy or combination in the modern criminal law is now to be traced.

[1600—1800.] The modern law of conspiracy has grown out of the application to cases of conspiracy, properly so called and as defined by the 33 Edw. 1, of the early doctrine that since the gist of crime was in the intent, a criminal intent manifested by any act done in furtherance of it might be punishable, although the act did not amount in law to an actual attempt. (Cp. by Mr. Greaves, in Cox's C. L. Cons. Acts, p. lxxxiv.) In accordance with this view it was determined in 1354 (Anon.), and again in 1574 (Sydenham), and finally settled on the authority of the former of those cases by the Star Chamber in 1611 (Poulterers' Case), that although the crime of conspiracy, properly so called, was not complete unless in a case of conspiracy for maintenance some suit had been actually maintained, or in a case of conspiracy for false and malicious indictment the party against whom

the conspiracy was directed had been actually indicted and acquitted, yet the agreement for such a conspiracy was indictable as a substantive offence, since there was a criminal intent manifested by an act done in furtherance of it, viz., by the agreement: and from this time, by an easy transition, the agreement or confederacy itself for the commission of conspiracy came to be regarded as a complete act of conspiracy, although traces of the original distinction between a completed conspiracy and the mere agreement or confederacy to commit it long continue to be found. (1699. Savile *v.* Roberts: 1705. Best: 1811. Turner.) Moreover, since in the Poulterers' Case nothing had been done which amounted to a complete crime under the statute, it followed that the criminality of the agreement must be in some sense a criminality by common law; and Lord Coke's observations on this point in his report of that case soon received an extended application, and grew into a rule that a combination to commit or to procure the commission of any crime was criminal and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy properly so called. The first indication of this doctrine in a text book is to be found in the insertion in those editions of the "Termes de la Ley"(*a*), which were published after the report of the Poulterers' Case, of a generalized paraphrase of that case. It is mentioned in 1665 (in Starling's Case) that there were precedents for informations in the Exchequer for conspiracies to commit offences relating to the revenue; and during the reign of Charles II. and the two following reigns the tendency towards the general establishment of the doctrine appears in the practice of inserting by way of aggravation (see by counsel for the crown in 1697. Thorp) in the inducements of indictments or informations for misde-

(*a*) 1629, 1641, &c. The passage does not appear in the edition of 1579. In the edition of 1629 it is marked as new matter.

meanors, the words "*conspiratione inter eos habitâ*," or "*per conspirationem*," or "*conspirantes*," or "*conspirans*" or "*machinantes et aggregantes*," especially in cases of cheats. Instances of this practice will be found in 1674 (Thody), 1682 (Lord Grey), and 1697 (Thorp; see the argument of the counsel for the crown); and in some cases (see 1685. Salter: 1704. Orbell) this seems to have been done, in conformity with the practice in civil actions on the case (1 Wms. S. 229 *b*, n. 4), even where the whole frame of the indictment was confined to a single defendant. The convenience of this mode of procedure in permitting the conviction of persons without proof of a complete crime had already been proved in indictments for treason (1600. Blunt: 1680. Stafford: 1683. Russell), and seems to have completely established the practice in the reign of George I.

The principal share in the earlier stages of this process must be ascribed to the Star Chamber. The jurisdiction of that court was, by the 3 Hen. 7, c. 1, specially extended to the punishment of "unlawful maintenances, giving of liveries, signs and tokens, and retainers by indentures, promises, oaths, writings, or otherwise embraceries of [the king's] subjects, untrue demeanings of sheriffs in making of panels, and other untrue returns, by taking of money by juries (*b*); by great riots and unlawful assemblies:" in other words, to the subjects of the ordinances of conspirators and of the statutes of riot; and not only the Poulterers' Case, which is the source of all the modern law of conspiracy, but all the other reported cases of conspiracy decided before the abolition of the Star Chamber in 1640 (16 Ch. 1, c. 10), were in that court.

In the meantime the general criminal law had received great extensions, first at the hands of the Star Chamber (*c*),

(*b*) There is a curious error in the print in Pulton (f. 24 *b*) of this portion of the act 3 Hen. 7, c. 1. The act runs (as above) "by taking of money by *juries*" (*i.e.* embracery), or in the French of the statutes of the realm—"pruise dargent par jurrez." This Pulton prints "by taking of money, by *injuries*, &c." Coke, in 4 Inst. 62, in his account of the jurisdiction of the Star Chamber, prints the words in the same way as Pulton, and he appends a comment on the "large word" injuries. The 4th Inst. was not published till the year after the abolition of the Star Chamber; but Pulton was a great authority, and Coke long acted as a judge in that court upon this reading of the statute—an error which may have had political as well as legal consequences.

(*c*) A case is reported in which this court punished the prosecutor as well as the prisoner. (Moore, 761.) "*Quod raro est experience devant*," says the reporter.

next from the Court of Exchequer, which, by the 33 Hen. 8, c. 39, had authority to punish at its discretion all trespasses, deceits, negligences, defaults, contempts, offences and other things wherein the king should be only party, and lastly and more permanently from the King's Bench. That court, in 1616 (Bagg's Case), asserted itself as a rival of the Star Chamber by resolving that "to this court belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of the peace or oppression of the subjects, or to the raising of faction, controversy or debate, or to any manner of misgovernment; so that no wrong or injury either publick or private can be done, but that it shall be reformed or punished in due course of law." "Although," Sir C. Sedley was told in 1664 (1 Sid. 168) "there was not now a Star Chamber, still they would have him know that this court is *custos morum* of all the subjects of the king." "Whatever" said Lord Mansfield, in 1773 (Jones *v.* Randall, Lofft. 383), "is *contra bonos mores et decorum*, the principles of our law prohibit, and the king's court, as the general censor and guardian of the public manners, is bound to restrain and punish." The procedure by indictment for conspiracy was during the 18th century applied to combinations for a great variety of purposes made criminal by these principles. It is next to be seen how, in certain cases after the ordinary criminal law receded from a portion of the wide area over which it had thus claimed jurisdiction during the 17th century, the law of conspiracy continued to be applied to combinations for purposes which had ceased to be criminal by the ordinary law.

Throughout the 17th century the question most frequently agitated was, whether as between the mere combination for criminal acts on the one hand, and the execution of the proposed acts on the other hand, the gist of the crime lay in such a combination or included the execution of the acts proposed. This was material for determining

how far the proposed acts must be fully and correctly set out in the indictment, how far the combination must be proved to have been carried towards execution, and whether a court which would not have had jurisdiction to punish the acts themselves might punish the combination, and whether, in cases in which the proposed acts were prohibited by statute, the offence must be laid to be *contra formam statuti*. In the course of the 17th century it became settled law that as between the combination to do the criminal acts and the acts themselves, the gist was in the agreement or combination, for all the above-mentioned purposes; and that even where the proposed acts were statutory offences, the conspiracy to do them might be laid and punished as a substantive crime at common law; and it became the current phrase that the conspiracy was the "gist of the indictment." (1663. Timberley: 1678. Armstrong: 1705. Best: 1719. Kinnersley.) This phrase, which at first expressed scarcely more than a rule of pleading, evidence, or jurisdiction, soon began to be quoted for a different object. During the 17th and the earlier part of the 18th centuries the law of cheats was still unsettled, and numerous cases are to be found in which cheats not of a public nature and not within the statute of false tokens (33 Hen. 8, c. 1) were held indictable; so that Hawkins, writing in 1716, defined the crime of cheating to consist in "deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty;" and several cases of such cheats had been prosecuted by way of conspiracy. But in 1720 (Wilders, cited in 2 Burr. at 1128) it was held that private unfair dealings, such as the fraud of a brewer in selling to a publican casks of beer untruly marked as to their measure, were not indictable; and the same view was taken by the King's Bench in 1730 (Bryan) in the case of a false pretence; and finally settled in 1761 (Wheatley). The same cases however which determined that such

cheats were not indictable in an individual, reserved their criminality in cases of conspiracy. Different grounds are stated for this reservation. The judges are made to put it in some cases on the ground that the combination makes the cheat public; in others (1761. Wheatley), on the ground that common prudence cannot guard against combination to defraud. Whatever may be the true ground of the doctrine, it has been found too beneficial to be questioned; and it has long been established law that a combination to defraud may be criminal, although the proposed deceit is not such as would be criminal apart from the combination.

Next a suggestion of a general doctrine that a combination may be criminal, although that which it proposes would not be criminal apart from combination, begins to appear in the arguments of counsel towards the close of the 17th century. In 1665 (Starling) it had been held that a conviction for a combination to "depauperate" the farmers of excise was good, because the indictment set forth that the excise was settled on the king as a part of his revenue, and the depauperation of the farmers of excise would prevent them from rendering him that revenue. In the argument in Thorp's Case (1697) as reported in Keble, Starling's Case seems to have been cited by counsel as an authority for a general doctrine of the kind above stated; but no judgment was given in this case. The doctrine seems to have been repudiated in 1704 (Daniell) by Lord Holt, who explained the exceptional ground of Starling's Case, namely, that there the combination "was directly of a public nature and levelled at the government;" and it seems not even to have been suggested in argument in Best's Case (1705). But in 1717 Hawkins' Pleas of the Crown was published, and in that work (i. 72, 2) it was stated that "there can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person, are highly criminal at common law;"—a proposition to which, unless by "wrongfully" he meant by

criminal means, the authorities cited by him (*d*), with the exception of the argument of counsel as reported in Keble, furnish little or no support. But from this time expressions of a similar kind begin to appear occasionally in judgments, and by the end of the 18th century an impression appears to have grown up amongst lawyers, which can only be described by the double proposition that a combination to do an unlawful act is criminal, and that in in this phrase "unlawful" does not necessarily mean "criminal." The consideration of the meaning, grounds and correctness of this doctrine must be deferred to a future section.

[1800—1872.] The most prominent characteristic of the law of criminal combinations in the present century is its extended application to combinations of workmen. Acts had in former times been passed to prohibit combinations of workmen for altering wages or hours (2 & 3 Edw. 6, c. 15), and during the 18th century several acts had prohibited combinations for controlling masters in particular trades. In 1799, the Act of 39 Geo. 3, c. 81, by sect. 1, provided that all agreements by workmen of any kind for altering hours or lessening quantity of work, or for hindering masters from employing such persons as they should please, or for controlling or in any way affecting a master in the conduct or management of his business should be "and the same are hereby declared to be illegal, null and void" to all intents; and by subsequent sections it provided that workmen entering into such agreements, or subscribing or collecting money, or attending meetings for the purposes of such agreements, or bribing, persuading or influencing other workmen not to enter into hirings, or to quit their hirings, or refusing to work with any other workman, &c., should be subject to

(*d*) 1354. Art. of Inq.; 1607. Lord Gray of Groby; 1611. Poulterers' Case; 1663. Timberley; 1665. Starling; 1678. Armstrong; 1699. Savile *v.* Roberts; 1705. Best. The later editors add—1719. Cope; 1721. Tailors of Cambridge; 1725. Edwards; 1793. The Prisoners' Case.

imprisonment. In the following year this act was repealed and replaced by the 39 & 40 Geo. 3, c. 106, which contained provisions substantially similar to those of the Act of 1799, but which required in the case of some of the offences that the acts must be wilfully and maliciously done. In 1824 the Act of 5 Geo. 4, c. 95, repealed all the then existing acts relating to combinations of workmen, and provided that workmen should not by reason of combinations as to hours, wages or conditions of labour, or for inducing others to refuse work or to depart from work, or for regulating "the mode of carrying on any manufacture, trade or business or the management thereof," be liable to any criminal proceeding or punishment for conspiracy or otherwise under the statute or common law. By another section it extended a similar immunity to combinations of masters. On the other hand it enacted a penalty of two months' imprisonment for violence, threats, intimidation and malicious mischief. It was repealed after a year's trial, and was replaced by the 6 Geo. 4, c. 129, A.D. 1825, which continued in force until 1871. This act again repealed the older statutes, but without mention of common law. It provided summary penalties for the use of violence, threats, intimidation, molestation or obstruction by any person for the purpose of forcing a master to alter his mode of business, or a workman to refuse or leave work, or of forcing any person to belong or subscribe or to conform to the rules of any club or association. It did not expressly penalize any combination or conspiracy, and it exempted from all liability to punishment the mere meeting of masters or workmen for settling the conditions as to wages and hours on which the persons present at the meeting would consent to employ or serve. In 1859 an amending act was passed (22 Vict. c. 34) for declaring that agreements by workmen or others as to the wages or hours of work, whether of the persons present at the meeting or of other workmen, and peaceable and reasonable persuasions by workmen or others to abstain from work in

order to secure such wages or hours, should not be deemed to be molestations or obstructions within the meaning of the Act of 1825; but with a proviso that this enactment should not authorize breach of contract by workmen or persuasion of workmen to break their contracts. This act also was repealed in 1871.

These statutes were soon enforced, as their predecessors had been enforced, not merely by the summary proceedings which they prescribed, but also by the more stringent means of indictments for combinations to infringe their provisions. Moreover, in the discussions which took place upon them, the question was raised and became the subject of some doubt and difference of opinion, whether in any and in what cases combinations for purposes dealt with by the acts, or for other analogous purposes, are criminal "at common law." The effect of the discussions and decisions is too doubtful to be stated here, but is attempted to be ascertained below.

For the rest, during this period the doctrine that combinations to defraud by means not criminal in themselves may be criminal, has been settled and perhaps extended (1872. Warburton); and the mode of proceeding by way of conspiracy against persons who combine to commit indictable offences has for the first time been applied to a combination to commit the common law misdemeanor of spreading false public news with intent to disturb the public markets. (1814. De Berenger.) In other respects the tendency of judicial legislation has been in general rather to narrow than to extend the application of the law of criminal combination; but no intelligible definition of "conspiracy" has yet been established. The object of the following sections is to collect the materials for such a definition.

Note 1. Search has been made without success for mention before the seventeenth century of any other kind of criminal combination than that mentioned in the first part of the foregoing subsection in Britton, Bracton, Fleta, Glanville, the Mirror, the cases of confederacy and conspiracy mentioned in the Indices to the Year Books

and Book of Assizes, the Register, Fitzherbert's N. B., Fitzherbert's, Brooke's and Rolle's Abridgments (titles Conspiracy, Confederacy and Corone), Rastal, Staundforde's P. C., Crompton's Justice, Pulton, the cases cited in Ashe's elaborate Index to the Common Law (1614), and in Coke, and in the more modern Text Books. The only early instance of an attempt to apply the law of conspiracy to other purposes seems to be the case, Anon. 1351, where a suit was brought to set aside judgment on a conviction for conspiracy to imprison a man wrongfully until he should pay a fine; and the court said that this was not matter of conspiracy, but rather damage and oppression of the people, and reversed the judgment.

Even the civil writ of conspiracy appears not to have been extended until the 17th century to any matters beyond the purview of the 33 Edw. 1. Instances will be found in the 15th and 16th centuries of its application to the making or use of false evidences, which may be traced to the statute, 1413, 1 Hen. 5, c. 3; but even this was not allowed in earlier times. See *e.g.* in 1364, Year Book, 38 Edw. 3, p. 13 b. Writ of conspiracy for conspiring to forge and put in evidence at a trial a false deed of release. Thorp, J., said, "And do you think you have a writ of conspiracy on ground of an evidence? You shall not have it."

It may be noted, with respect to two passages in Vin. Abr. Consp. (H.) 6 and 11, that the former passage attributes to Lord Holt the contrary of what he said; and that the second is merely an assertion of counsel arguendo that a certain matter was indictable which, it appears from a better report, the K. B. after two arguments held was not indictable. See the case, 1725, Edwards, in App. II. *infra*.

From very early times "conspiracy" and "confederacy" were distinguished as different crimes under the 33 Edw. 1; "conspiracy" becoming appropriated to false and malicious indictments, while "confederacy" was especially used to designate combinations for maintenance. See 1354, Anon., and 29 Ass. 45.

Note 2. It is said by Lord Coke (2 Inst. 561, 562), and other old authorities, that the stat. 33 Edw. 1 is only declaratory of the common law. But the only proof alleged for this proposition is the fact that the "villainous judgment" must be given by the common law because it is not given by any statute. This judgment, however, is only the ordinary judgment in attaint, and no great stress can be laid on its application to a crime so closely allied to those in which it was ordinarily given. Moreover, the attaint in conspiracy is probably to be traced to the application by judges of assize inquiring into conspiracies, champerties and maintenances under 4 Edw. 3, c. 11, of the provisions of 20 Edw. 1 for attainting champertors and maintainors. The following reasons appear to be nearly conclusive that the crime of conspiracy was created by statute, and that no such crime was known to the "common law:"—

1. No mention of any such crime has been found in any work older than the first Ordinance of Conspirators, A.D. 1292, 20 Edw. 1; and it is believed that there is no earlier mention even of a civil writ or regular remedy for conspiracy. The passage in Britton, which is indexed in Nichols' edition as relating to conspiracy (i. 22, 19, p. 95), relates to embracery, and the text uses the word "alliances" and not the word "confederacies," by which it is repre-

sented in the translation. Bracton does not mention any separate crime of conspiracy. He speaks of "conspiration" in conjunction with counselling, abetment, and aid, and says that none of these are punishable in themselves, but that if a crime is committed, then the guilt of the principal offender extends to those who counselled, aided or contrived the crime (f. 128).

2. It was the business of the tourn and leet to inquire of common law crimes, but neither in the Statute of Wales (attributed to 12 Edw. 1, A.D. 1284), which contains a detailed list of all offences to be inquired into at the tourn before the sheriffs, commencing with the highest felonies and descending to offences against the assize of bread, and which gives a curious and apparently complete picture of the criminal law of that time; nor in the View of Frankpledge (attributed to reign of Edw. 2) is there mention of any kind of conspiracy, confederacy or combination.
3. In the 13 Edw. 1, stat. 1, c. 12 (Westm. 2, A.D. 1285), detailed provision is made for the punishment of malicious abettors of false appeals of felony; but, although if conspiracy, confederation or combination had then been known to the law, mention of them might have been expected here, no reference is made to either of them.
4. Some cases of complaints to the King against conspirations, machinations and favour by officers (*i. e.* embracery), answered by promises of special relief, will be found in the Rot. Cl. as early as 18 Edw. 1 (Rot. Cl. vol. i., p. 48 *a*, No. 32; p. 49 *a*, &c.); but the first ordinance for a general writ of conspiracy (20 Edw. 1) expresses itself to be founded on a statute which it recites, and it makes no reference to any other ground for the writ.
5. Nearly all the old forms of writs of conspiracy conclude *contra formam ordinationis.*
6. The terms of the commission of oyer and terminer are cited in several cases, from the Poulterers' Case (1611) downwards, to show that combinations to commit crimes may be themselves punishable at common law. Thus Coke says (Poulterers' Case):—

> "Also the usual commission of oyer and terminer gives power to the commissions to enquire, &c., *de omnibus coadunationibus confœderationibus et falsis alliganciis;* and *coadunatio* is a uniting of themselves together, *confœderatio* is a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act. In these cases before the unlawful act executed the law punishes the coadunation, confederacy or false alliance, to the end to prevent the unlawful act, *quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud: et affectus punitur licet non sequatur effectus;* and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it:"

and in some later cases the words are cited even for the

purpose of proving that combination is *per se* criminal at common law. It can however be shown almost with certainty, that they have no such meaning, and this by the best proof, namely, proof of what their meaning is, and how they came to be introduced. The words "alliances, conspiracies, confederacies and champerties" were introduced by the 2 Edw. 3, c. 7, and the 4 Edw. 3, c. 11, which followed the terms of, and was designed to enforce the 20 Edw. 1, and the 28 Edw. 1, c. 10, and the 33 Edw. 1, by criminal proceedings; and accordingly in the Articles of Inquest of 1354, set out in 27 Ass. 44, there appears an article following nearly the language of 28 Edw. 1. See also the commission of oyer and terminer of 1368, in 42 Ass. 5, to the same effect. Next in 1353, by 27 Edw. 3, st. 2, c. 25, it was made felony for merchants to make "conspiracy, confederacy, covine, imagination, murmur, or mal-engine" for the disturbance of the staples and of the price of wool, contrary to the provisions of the 27 Edw. 3, stat. 2, c. 3; and accordingly in the Articles of Inquest of the following year, there appears an article "Also of merchants who by covin and alliance between them put a certain price on wools which are for sale in the country, so that no two may buy or pass other in buying wools beyond the certain price which themselves have ordained, to the great impoverishment of the people:" and under this article was decided the Lumbard's Case in 1369. The words "*congregationes et conventicula illicita*" are regularly used in ancient documents (*e.g.* 1 Rot. Cl. 371; 3 Rot. Cl. 105*a*), to describe riotous and seditious assemblies made *proditorie* or in breach of the peace; but their introduction into the commission is probably to be traced to the 42 Edw. 3, c. 6, which directed commissions to be issued to justices of oyer and terminer to enforce the Statutes of Labourers, of which the 37 Edw. 3, c. 5, had prohibited alliances, covines and congregations of masons and carpenters. The commission in Coke's time, 2 Inst. 161, further included "coadjutationibus," which means abetment, especially in disseisin by force (see Co. Litt. 180*b*). The result is that the words in the commission which relate to combinations do not of themselves furnish sufficient ground for the inference which has been sometimes drawn from them, that there existed in ancient times a general common law crime of conspiracy; and that on the contrary their history appears to show that these words, as they are used in the commission, refer to particular crimes of combination within the 21 Edw. 3, or created by later statutes. It may be observed that the expression "falsis alligantiis" is mistranslated "false allegations" in modern commissions.

7. The origin of the crime of conspiracy seems to have been as follows:—According to Bracton (143) there were two modes of commencing prosecutions for felonies. The first was by way of appeal, which was guarded against abuse by the personal and pecuniary liabilities of the appellor, of which details will be found in Bracton. The other mode was, that

the grand jurors who were charged with the duty of making presentments or of finding indictments should inquire into suggestions of felony which might reach them "*per famam patriæ*," or, in other words, either of their common knowledge or by several persons coming to inform them, without any formalities, that A. or B. had committed a crime. Thereupon the grand jurors were sworn to inquire as to the truth of the information, and if the informers proved trustworthy, the grand jurors found an indictment. Three inconveniences were discovered in the time of Edward I. in these forms of procedure. The first to be discovered was that appeals were brought by persons who had not money to pay damages. The second was that children under twelve, who could not be outlawed (Bract. 125), and against whom no damages could be recovered, were incited to bring appeals. The third was that there was no remedy against the persons who conveyed to the grand jurors a false *fama patriæ*. The first of these difficulties was dealt with by 13 Edw. 1, st. 1, c. 12. The third was partially dealt with by the first Ordinance of Conspirators (20 Edw. 1); and again by the second Ordinance of Conspirators (28 Edw. 1, c. 10), and again by the third Ordinance of Conspirators (33 Edw. 1), which also dealt with the second difficulty. But these statutes only provided a remedy by writ, the 20 Edw. 1 by writ out of chancery, on which however imprisonment might be awarded, the 28 Edw. 1 by inquest without writ. The 4 Edw. 3, c. 11, made conspiracy effectively criminal, by directing the justices of either bench or of assize in sessions to hear and determine conspiracies and maintenances. See Rast. Entr. Consp. 5, for a case in which it is expressly averred that the conspiracy was to cause a person to be indicted by "*communis vox et fama*." A further confirmation is to be found in the numerous ancient cases in which it was held that it was a good answer to a writ or indictment for conspiracy that the defendant was a grand juror (or "indictor") bound to find the indictment, or that he was summoned by the jurors and compelled to inform them upon oath, or that he was bound o inform them as being a justice. In short the remedy of conspiracy was required only in those cases in which there was no other remedy or security for truth, and in which the defendants had volunteered their information, and in these cases it was applied and extended by successive statutes as experience proved its necessity.

SECTION II.

The Kinds or Purposes of Criminal Combinations.

§ 2. *Arrangement of this Section.*

It is proposed in this section to consider the cases on criminal combinations in the order of certain heads or kinds of subject-matter under which they appear to have arranged themselves as they occurred; as follow:—

§ 3. Combinations to commit conspiracy, properly so called, within the meaning of the three ancient ordinances of conspirators.

§ 4. Other combinations expressly prohibited by statutes now in force.

§ 5. The rule of the 17th century that combination for any crime is punishable.

§ 6. The question of a wider rule.

§ 7. Examination of cases on combination against government.

§ 8. Examination of cases on combination to pervert or defeat justice.

§ 9. Examination of cases on combination against public morals and decency.

§ 10. Examination of cases on combination to defraud.

§ 11. Examination of cases on combination to injure individuals (otherwise than by fraud).

§ 12. Examination of cases on combinations relating to trade and labour:—(1) Restraint of trade and disturbance of markets.

§ 13. Examination of cases as to trade and labour continued:—(2) Coercion of individuals.

§ 14. Summary of this section. — Lord Denman's antithesis.

§ 3. *Combinations for Conspiracy, properly so called.*

The ancient ordinances of conspirators, namely, 20 Edw. 1, 28 Edw. 1, and 33 Edw. 1, which are still in force, extend only to combinations for the false and malicious promotion of indictments or suits, for embracery, or for maintenance of various kinds. Embracery and maintenance are independent crimes, and they need not here be considered in detail. (See Pulton, and 1 Russ. by Gr. 254, 264). The word "conspiracy" was from an early date specially appropriated to false and malicious promotion of indictments for felony, and it was not complete unless by the procurement of the conspirators an indictment was actually found, and the person indicted was tried and acquitted. Accordingly conspiracy is defined by Coke (3 Inst. 142-3) as "a consultation and agreement between two or more to appeale or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted and appealed; and afterward the party is lawfully acquitted by the verdict of twelve men." The ancient judgment for this crime was the "villainous judgment" usual in attaints for crimes of falsity in relation to justice, and was as follows:—

1372. 46 Ass. 11 (p. 307).

"A man was attainted of conspiracy at the king's suit by indictment, wherefore it was awarded that he lose frank-law, and that he must not be put henceforth on juries, nor on assize, nor on testimony of truth, and if he had business in the king's court he must make an attorney to sue for him, and that he approach not within twelve leagues of where the king's court is, and that his goods be seized into the king's hand, and his houses wasted, and his wife and his children ousted, and his trees cut down, and his body taken and imprisoned. But if he were attainted at suit of the party, he would have but simple judgment that the plaintiff receive his damages, and that he be imprisoned, &c." (See s. p. 27 Ass. 59, p. 141*b*. Coke, 3 Inst. 143, adds some further circumstances of aggravation.)

Even before Coke's time it had been held (1574. Sydenham) that an indictment might lie for such a combination, although the indictment preferred by the conspirators had not been found by the grand inquest; and it

was finally settled by the Poulterers' Case in 1611 that the mere act of combination to commit the crime of conspiracy was punishable. During the 17th century it became further established that combinations to accuse of offences not amounting to felony might be criminal; and it remains to trace the extension which in this respect the crime of combination to commit conspiracy has received in modern times.

In 1663 (Timberley) it was held that a combination falsely to charge a man with the merely spiritual crime of fornication, with intent to extort money from him, was indictable, stress being laid on the intent to injure by extortion as giving jurisdiction to the temporal court; and according to Keble, Windham, J., said it would have been the same if the combination had been to charge with heresy or to defame or disgrace him. This case was followed in 1678 (Armstrong), and in Best's Case (1705), where the intent was laid to be to obtain money and to defame; and the K. B. (Holt, C. J.) held that "a confederacy falsely to charge a man with a thing that is a crime by any law is indictable." In 1719 (Kinnersley) the court seem to have thought it essential that the charge should be of a crime of some kind. But in 1762 (Rispal) Lord Mansfield held it sufficient that there was a combination to obtain money from a man by charging him with "a false fact,"—"whether it be to charge a man with criminal acts or such as only may affect his reputation." In 1809 (Teal) the combination was to obtain an affiliation order by perjury; a case which may fall either under this head or under the head of combinations to pervert justice. It was anciently always held essential that the accusation should be to be made *falso* as well as *malitiosè*. But in 1825 (Hollingberry) the K. B. held that if the purpose was to extort money by indictment, it was immaterial whether the charge was true or false; and this case was followed in 1845 (Jacobs) by the Recorder of London, with the modification that the question of

truth or falsity might be material for determining the question of intent. (Cp. as to indictments under the statutes for threats to accuse of crimes with intent to extort: —1843. Hamilton, 1 C. & K. 212; 1862. Menage, 3 F. & F. 310; 1866. Cracknell, 10 Cox, 408; 1868. Richards, 11 Cox, 43.) These authorities further establish that a purpose actually to prefer a charge in a competent court or in any court is not essential. In fact in most of them the purpose was to obtain money for not preferring a charge. But it would seem to be of the essence of this crime that there should be a purpose to charge publicly, and if there is any case of conspiracy to charge a man privately, that must be regarded as a case of combination to extort or to cheat. (Cp. Yates, 1853.) In the absence of intent to extort, the purpose must still be to charge falsely or without belief of reasonable grounds. "People may lawfully meet and contrive and agree to charge a guilty person," but "it is a crime for several people to join and agree together to prosecute a man right or wrong." (1629. Tailor; Lord Holt. 1705. Best; S. P. 1823. Murray.)

Under this head fall the cases of combination:—

1354. Anon.
1356. Anon. } to commit maintenance.
1574. Sydenham *v.* Keilaway: to indict falsely.
1599. Amerideth: to commit maintenance.
1607. Lord Gray, of Groby: to commit maintenance.
1608. Floyd *v.* Barker: to indict falsely.
1611. Poulterers: to indict falsely.
1612. Ashley: to indict falsely.
1629. Tailor and Towlin: to indict falsely.
1663. Timberley: to charge with a bastard, with intent to extort.
1671. Opie: to commit embracery.
1678. Armstrong: to charge with a bastard, with intent to extort.
1680. Blood: to indict falsely.
1705. Best: to charge with a bastard, with intent to extort.
1719. Kinnersley: to accuse of misdemeanor, with intent to extort.
1756. M'Daniel: to procure a man to commit what he supposed to be a robbery, with intent falsely to indict him and obtain a reward for his conviction.
1760. Spragg: to indict falsely.

1762. Rispal: to charge with matter not criminal but defamatory, with intent to extort.
1763. Parsons: to accuse of murder.
1809. Teal: to obtain an affiliation order by perjury.
1809. Stratton: to indict falsely.
1814. Askew: to indict falsely.
1825. Hollingberry: to indict, with intent to extort.
1833. Ford and Aldridge, to accuse of forgery, with intent to extort.
1834. Biers: to inform falsely, with intent to extort.
1845. Jacobs: to indict, with intent to extort.

A great number of cases of complete conspiracies, in the ancient sense, will be found in the Year Books and old Abridgments. They are now obsolete, and they are accordingly omitted both from this list and also from the Appendix.

§ 4. *Other Combinations expressly prohibited by Statute.*

Besides the ancient ordinances of conspirators, statutes relating to criminality of combination (other than trade combinations), have been of the following kinds.

In the reign of George 3 several acts (1797, 37 Geo. 3, c. 123; 1799, 39 Geo. 3, c. 79; 1817, 57 Geo. 3, c. 19), were passed, which in their main scope were directed against treasonable or seditious societies, but which contain sections of the most comprehensive and stringent character. The Act of 1797 makes it felony to take or administer unlawful oaths *or engagements* for various purposes, including the concealment of "any unlawful combination or confederacy." The Act of 1799 enacts that every person shall be deemed guilty of an unlawful combination and confederacy who belongs or contributes to or directly or indirectly maintains correspondence or intercourse with any society (or any branch committee, officer, or member thereof as such), which requires its members to take any oath or engagement within the Act of 1797, or any unauthorized oath; or the members of which take, subscribe or *assent to any test or declaration* not required by law and not authorized by approval of two justices confirmed by quarter sessions; or which has any committee, or members, or officer whose names are kept secret from the society at large, or are not

entered in a book open to the inspection of every member; or which is composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other; or of which any part has any separate or distinct officer; and it provides that offenders shall be liable either to summary punishment, or, upon conviction or indictment, to transportation (now penal servitude) for seven years. The Act of 1817 further provides that every society or club which elects, appoints, nominates or employs any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, representative, &c. of such other society or club, or to induce or persuade any person to become a member, shall be an "unlawful combination and confederacy" within the Act of 1799, and that persons joining or directly or indirectly maintaining correspondence or intercourse with any such society or with its officers, &c., as in the Act of 1799, shall be punishable as provided by that act. These acts contain some exceptions in favour of freemasons, quakers, and charities; and the 18 & 19 Vict. c. 63, s. 12, exempts friendly societies and their meetings, at which "no business whatever is transacted other than that which directly and immediately relates to the objects of the society as declared in the rules thereof, and set forth in the certified copy thereof;" and probably similar particular exemptions are contained in some other acts. Further, the Act of 1817, s. 37, provides that the Attorney-General may in any case stay proceedings, and that a Secretary of State may remit punishments in cases under that act or the Act of 1799; and the 9 & 10 Vict. c. 33 (1846), provides that proceedings for fines or forfeitures under the Acts of 1799 and 1817 must be commenced in the name of the Attorney-General. But even these safeguards seem not to extend to the Act of 1797.

It is impossible to form any certain conclusion as to the extent to which the generality of the enacting words in

these statutes may be limited by their preambles. The inclination of the judges in the few reported cases upon their construction (1802. Marks; 1816. Brodribb; 1834. Ball; 1834. Lovelass; 1834. Dixon) seems to have been to think that they are not so limited; and this view is supported by the fact that it was thought necessary expressly to save bodies so obviously harmless as meetings of quakers and of charitable societies. In any case their indirect effect in rendering many societies at least technically illegal, must be important; and in any conclusion which is formed as to the criminality or illegality of a society, there must be an implied reservation of the possible effect of these statutes. The Trades Union Act, and Criminal Law Amendment Act of 1871 (34 & 35 Vict. c. 31 and c. 32), appear not to contain anything to exclude their operation. But it has been ruled (1834. Ball) that a combination with reference to wages is not necessarily illegal for the purposes of the statutes of George 3.

The statutes next in order of general importance are those which relate to treason and to treason-felony; but these belong to the law of treason, and they do not affect the general law of conspiracy, except by applying it to treasonable purposes. (See Mulcahy *v.* Reg. 1868, L. R., 3 E. & I. App. 306.)

Conspiracies to murder any subject or alien either within or without the Queen's dominions are by the 24 & 25 Vict. c. 100, s. 4, punishable as misdemeanors, with penal servitude not exceeding ten, or imprisonment not exceeding two years.

The statutes relating to trade combinations are reserved for future subsections—§§ 12, 13.

Under this head fall the cases of treasonable combinations, and the cases of—

1802. Marks: trades union using unlawful oath.
1816. Brodribb: assembly using unlawful oath.
1834. Ball: trades union using unlawful oath.
1834. Lovelass: trades union using unlawful oath.
1834. Dixon: trades union using unlawful oath.
1852. Ahearne: conspiracy to murder.

§ 5. *Rule of* 17*th Century that Combination for any Crime is punishable.*

It has already been seen (*sup.* Sect. I. § 1) how in the course of the 17th century the rule established in the Poulterers' Case, that a combination to commit conspiracy was punishable, although the conspiracy had not been executed, was extended into a rule that a combination to commit any crime was punishable, although the crime had not been executed. A great number of cases are reported in which this rule has been applied. Most of them will conveniently be considered in the following paragraphs relating to particular criminal purposes, but some which do not fall within any of those groups may here be mentioned.

1682. Lord Grey: to commit abduction and procure adultery. (This case appears not to have been prosecuted as a case of conspiracy; but, assuming that it was so prosecuted, it was prosecuted as a combination to commit the offences mentioned. See *inf.* p. 106.)
1809. Pollman: to commit the misdemeanor of obtaining money for procuring an office of public trust.
1820. King: to poison horses (9 Geo. 1, c. 22).
1820. Hunt: to form an unlawful assembly.
1827. Wakefield: for abduction of an heiress.
1830. Maudsley: to poison.
1848. Brittain: to commit forgery.
1848. Button: by workmen to dye goods for their own profit with the master's dyes.
1851. Thompson: by removing customable goods without payment of duty (3 & 4 Will. 4, c. 120).
1864. Kohn: to commit barratry with intent to defraud underwriters (24 & 25 Vict. c. 97, ss. 42—4).
1868. Desmond: to commit prison breach.
1871. Boulton: to commit unnatural crime.
1871. Taylor: to steal (see the case and *quære*).

With respect to these cases, it need only be observed, that since the establishment of the doctrine that a combination to commit any crime is indictable as a criminal confederacy or combination, notwithstanding that the proposed acts may have been criminal only by virtue of some statute, the criminal combination has always been described as a common law crime, in the sense that it

need not conclude *contra formam statuti* (1721. Journeymen Tailors of Cambridge, and all the later cases), and that it is punishable as a misdemeanor at common law and not in the manner in which the proposed crime would be punishable; and it was held in 1851 (Thompson), that the repeal of the statute before the trial of the indictment for the combination to infringe its provisions was no bar to the trial. Lord Campbell observed, that this rule might have the effect of indirectly avoiding a limitation of time prescribed by a statute for the prosecution of offenders against its provisions; and the case before the court afforded an instance of that result.

The expression, that a conspiracy or combination to commit a crime is criminal at common law, is applied without regard to whether the proposed crime is or is not statutory; whence it follows, that when a combination is said to be criminal at common law, it is not necessarily implied that the criminality of the combination does not depend on the fact that the combination is for violation of a statute.

It will be seen below (§ 13), that in numerous cases violations of statutes relating to labour have been punished by way of indictment for conspiracy; but it does not appear, that in any other case, except perhaps in cases under the Revenue Acts, persons have been indicted for combining to violate provisions of a statute for the breach of which the statute prescribes only a summary penalty or punishment.

§ 6. *The Question of a wider Rule.*

It has already been seen, that during the 18th century, an impression obtained currency that a combination might in many cases be criminal, although the acts proposed would not be criminal in the absence of combination. The most convenient mode of dealing with this subject seems to be firstly to examine the decisions and dicta under each of the several groups in which the cases

bearing on the question have arranged themselves (§§ 7—13); and, secondly, to examine (§ 14) certain more general expressions which do not purport, or which are cited as not purporting, to be confined to any or all of these special groups.

§ 7. *Examination of Cases on Combinations against the Government.*

Cases which have a bearing on the question, whether in matters of a directly public nature, combinations may be criminal which are for acts not criminal apart from combination, are the following:—

1665. Starling: combination to lessen the king's revenue.
1769. Vertue *v.* Lord Clive: combination by officers to throw up their commissions in time of danger.
1814. De Berenger: combination to disturb the funds by false rumours.
1839. Vincent: }
1840. Shellard: } Combination to excite disaffection or insurrection.
1844. O'Connell: }

The origin of the doctrine that a combination may be criminal which is directed against the public as a whole or against the government is to be found in the case of the Brewers of London (1665. Starling), where the indictment set out that the excise had been settled by parliament on the king as part of his revenue, and that the defendants conspired to depauperate the farmers of the excise. The K. B. after several debates gave judgment for the crown on the ground that the effect of depauperating the farmers of the excise must necessarily be to make them incapable of rendering the king his revenue, and so the offence (as Lord Holt says of it in 1704. Daniell) was "directly of a publick nature and levelled at the government, and the gist of the offence was its influence on the publick." On the same ground in the cases of Vincent (1839), Shellard (1840), and O'Connell (1844), combinations to excite insurrection or disaffection have been held indictable. It is worthy of observation that the purposes imputed by the

court to the defendants in Starling's Case in 1665 seem, according to the doctrines of those times as shown in the "Case of Currants" (1707. Bates; Lane, 22), to have been regarded as punishable independently of combination (Cp. the Exchequer Act, 33 Hen. 8, c. 39, *sup.* Sect. I. § 1); and that according to authorities of the 17th century the use of seditious language, as in the cases of Vincent, Shellard and O'Connell, would also have been indictable without combination. (1662. Field, 1 Sid. 69; 1679. Harrington, 1 Ventr. 324.) In Vertue's Case (1769) the whole of the officers of the East India Company's service in command of Sepoys, with the exception of the field officers, combined to throw up their commissions at once at a time of public danger, and before the expiration of the period for which they had received advanced pay, on the ground of a grievance with respect to allowances. The question came before the K. B. whether such resignations were operative to release the officers from their duty to obey orders. Lord Mansfield, C. J., and Aston and Willes, JJ., held, that under the Indian Mutiny Act then in force the officers were not at liberty to resign under all circumstances; and that the circumstances of public danger and of general combination to resign made such resignations inoperative. Yates, J. went further, and said that this combination was criminal. De Berenger's Case (1814) is mentioned here because some of the observations made in it refer to the injury which the public may receive from disturbance of the funds by false news. But according to a series of cases from the 14th century downwards, the circulation of false news, especially if the purpose is to disturb markets or prices, is indictable irrespectively of combination; and so this case appears to fall within the rule of the criminality of combinations to commit crimes. (See 1369. Lumbard's Case; 1620. Maddock, 2 Rol. Rep. 107; Jenk. 1 Cent. 93; 1680. Harris, 7 St. Tr. 999, by all the judges; 7 & 8 Vict. c. 24, s. 4; Cp. 1800. Waddington, 1 East, Rep. 154).

These cases appear not perhaps to establish but still to tend strongly to establish a rule that combinations directed against the government or public safety may be criminal, although the acts proposed might not be criminal in the absence of combination: but they furnish no indication of the limits of the rule, supposing it to exist.

§ 8. *Examination of Cases on Combination to pervert or defeat Justice.*

The next group consists of cases on combinations to pervert or defeat the administration of justice;—a kind of combination which is *in pari materiâ* with those against which the original ordinances of conspirators were directed.

To this group belong the cases of combination.

1796. Mawbey: by justices, to influence the King's Bench by false certificates of the repair of a road.
1802. Steventon: to obstruct justice by persuading a witness for the crown in an information not to appear.
1804. Locker: to procure a ward in chancery to marry one of the defendants.
1807. Claridge *v.* Hoare: to prevent a prosecution. (*Dict.* by Lord Eldon.)
1814. Wade *v.* Broughton: stealing a ward in chancery for the sake of her fortune. (*Dict.* by Lord Eldon.)
1818. Kroehl: "to procure the discharge of the defendant K. from custody on mesne process, without giving notice to the plaintiff's attorney."
1819. Roberts *v.* Roberts: to get rid of an excise information by creating a fictitious qualification to kill game. (*Dict.* by Best, J.)
1820. The Queen's Case: to suborn witnesses to commit perjury.
1824. Thomas: to produce false witnesses at a trial.
1826. Bushell *v.* Barrett: to buy off witnesses on an information for penalties before justices.
1837. Murphy: to prevent levy of a church rate by libelling the collector and inciting persons to resist him.
1852. Hamp: to obstruct justice by paying a witness to forfeit his recognizances for appearance at a criminal trial.

In the cases of Mawbey, Steventon, The Queen, Thomas, Bushell and Hamp, it seems clear that the

acts proposed were indictable at common law apart from the combination. (See Vin. Abr. Ind. (E.) 4; 1726. Dupee, 2 Sess. Ca. 11; Fitzgib. 263; 1807. Omeally *v.* Newell, 8 East, 364; 1801. Higgins, 2 East, Rep. 5; 1791. Jolliffe, 4 T. R. 285.) So in the cases of Locker and of Wade *v.* Broughton. (See 1738. Pierson, Andr. 310, 2 Stra. 1107; 1729. Harris, 2 P. Wms. 560.) In the case of Roberts *v.* Roberts the false deed must have been proved by perjury before it could have been used as a defence to the information, and even if it had been used so as to deceive the court without actual perjury, its use would seem to be within the principle of Omeally *v.* Newell, cited above, or of Mawbey (1796). The case of Kroehl is too briefly reported for it to be possible to say whether the act proposed was indictable without combination. (See Fawcett, 2 East, P. C. 862.) In Claridge *v.* Hoare, it must be presumed that Lord Eldon was referring either to composition of felony or to the use of improper means, such as those used in the cases of Steventon and Hamp. Lastly, in Murphy's Case there was not only a libel but also an incitement to riot. On the whole it is conceived that all these are cases in which the acts proposed were, at the times when the cases were decided, punishable on indictment or information, or at least as contempts of court. But it seems possible that, in matters of this nature, the criminal courts would not hold themselves strictly bound by these limits, and that combinations for such acts on the verge of criminality might be held indictable, although the acts might be not indictable apart from the combination. It is conceived, however, that some kind of falsity or violence or abuse of process of the court would be necessary. And here the difficulty recurs of obtaining any distinct and definable limitation when once the established lines of the ordinary criminal law are overstepped.

§ 9. *Examination of the Cases on Combination against Public Morals and Decency.*

Cases of combinations for acts grossly in violation of public morals or decency are the following:—

1763. Delaval: to make a colorable assignment of a female apprentice for purposes of prostitution.
1780. Young: by officers of a workhouse to prevent the burial of a corpse.
1851. Mears: to entice a girl of 15 by false pretences to have illicit connection with a man.
1864. Howell: to procure an unmarried girl of 17 to become a common prostitute.

It can hardly be doubted that in the three former of these cases the acts proposed were indictable at the dates of those cases, independently of combination, on the principle established in the cases of Sedley (1664. 1 Sid. 168; 1616. Bagg), and many other cases, that conduct grossly contrary to public morals or public decency was punishable irrespectively of combination. It can hardly be doubted, for example, that the master of a female apprentice would have been indictable, in 1763, even if he would not now be indictable, if he induced his apprentice to practise prostitution for his profit, and this was in substance the conduct of the principal defendant in Delaval's Case. Lord Mansfield, indeed, there relied on a then recent case, in which a prosecution had been directed of a man who had made an assignment of his wife to another man. (Cp. further as to this class, 1692. Johnson, Comb. 377; 1788. Lynn, 2 T. R. 734; 1 Leach, 497; 1820. Gilles, R. & R. 366, *n.*; 1840. Stewart, 12 A. & E. 773.) So in Howell's Case there were facts abundantly sufficient to have supported a conviction of a sole defendant on similar grounds, if they had been properly laid in the indictment; but the indictment seems to have failed to show that the girl was not previously of bad character. Bramwell, B., is reported to have ruled that any unlawfulness in the state of things proposed to be brought about would suffice, according to Lord Denman's

definition of conspiracy (*e*), and that, since agreements for prostitution or claims for goods supplied for purposes of prostitution are illegal in the sense that they cannot be enforced, prostitution itself is a sufficiently illegal state of things to render indictable a combination to bring it about. It is conceived that the expressions attributed to Bramwell, B., cannot be correctly reported. They would appear to involve the criminality of every assignation with a woman of bad character. No such doctrine is found in any earlier case; nor is it involved in the early precedents of indictments for adultery in times when adultery was both an ecclesiastical and a temporal offence. (*E.g.* Tremayne's Prec. pp. 209, 213.) An act was passed by the Long Parliament in 1650 (c. 10, p. 121, of Scobell's Ordinances), in the sense of the expressions reported in Howell's Case; but it was not continued by Charles II.

§ 10. *Examination of Cases on Combination to defraud.*

The history of combinations to defraud, and the manner in which, after certain kinds of cheats had ceased to be indictable when committed by one person, they continued to be indictable when done or planned by persons in combination, have already been described; and it remains to consider briefly what is the nature of the fraud or cheat which will suffice to make criminal the combination to effect such a fraud or cheat. The definitions of fraud and cheat belong to the general law of crimes, and they cannot here be discussed. The essence of a cheat appears to consist in (i) a false representation by the defendant by words, instruments or conduct (active or negative) that a certain state of facts (other than a condition of his own mind) exists or does not exist; (ii) the fact that a belief

(*e*) See as to this, *inf.* § 14.

in the truth of the representation had an effect on the prosecutor as a material inducement to, or a material condition of, his consenting or not refusing to part with a right or forego a claim or undertake a liability of pecuniary value or consequence; and (iii) the fact that the false representation was intended by the defendant to have that effect, or, to use Bentham's phrase (1 Morals and Legisl. 141), that the prospect of producing that effect "constituted one of the links in the chain of causes by which the person was determined" to make the false representation. In other cases the generality of this principle has been guarded by limitations; but in the crime of combination to defraud only one limitation appears to remain, namely, that the intended fraud must involve something which amounts or would, but for restrictions imposed by statutes made *alio intuitu*, amount to a wrong for which there is a civil remedy at law or in equity. It has been recently determined (1870. Warburton) that a merely equitable wrong will suffice; and it was ruled in 1858 (Timothy, Channell B.) that a combination to defraud by false verbal representations of the solvency of a bank was criminal, although by reason of Lord Tenterden's Act (9 Geo. 4, c. 14) the defendants might not have incurred any civil liability. A case (1833. Levi) in which a "knock-out" at an auction was held indictable, may be thought to have gone to the farthest extent which is compatible with the application of any principle. It may be explained on the ground that, had the auctioneer known of the combination, he would not have knocked down the goods to any of the persons concerned in it;—that his consent to the transfer of property was obtained by a false appearance of competition.

It has been uniformly held in modern times that a false pretence may suffice for conspiracy, which would not suffice for the statutory crime of obtaining by false pretences, but it may be doubted whether some of the same limitations which have been applied in the construction of

the statute do not apply in conspiracies to defraud. Such are—

a. The rule, that the prosecutor must have intended to part with his whole right of property in the thing: —*e. g.* to obtain by false pretences the bailment of a horse, intending never to pay the hire, is not an obtaining of the horse by false pretences;—

b. The rule, that a promise (as distinguished from a representation of ability to pay &c., or of existing foundations of a future ability to pay &c.) will not suffice;

c. The rule, that the pretence must be of a definite and "triable" state of facts, and not merely false and exaggerated praise or dispraise.

In general, it would seem that in cases of false pretences under the statute, it is for the court to say whether the proposed deceit amounted to a fraud in law, and for the jury or other judge of facts to say whether the thing was obtained by it; but in a conspiracy to defraud, the only question for the jury seems to be whether the defendants meant to use the fraud for the purpose of obtaining the thing. Here a question arises which goes to the root of the doctrine of conspiracy. Suppose a case in which the purpose to cheat is plain, but the proposed deceit is such that it could not have any effect for deceiving the persons intended to be defrauded. Here, if the essence of the conspiracy is merely in the intent, the agreement for such a purpose must be sufficient, and this view is perhaps supported by some of the ancient cases of treason. On the other hand, to treat such a combination as criminal would be like indicting a man or several men for attempting or conspiring to murder another by conjurations. Such a doctrine appears nevertheless to follow from those cases or *dicta* in which it has been ruled or suggested that combinations to "injure," "prejudice," "intimidate" or "coerce," are criminal irrespectively of the criminality of the means to be used. But if on the other hand the law of conspiracy

is, as its history seems to indicate, merely an extension of the law of attempts to commit crimes, then the result seems to follow that the proposed means must be such as might probably be effectual for the proposed end. On the other hand, it is not probable that all the refinements of the law of attempts would be applied to conspiracy. A conspiracy to pick a man's pocket would probably be held criminal, although there was nothing in the pocket. A conspiracy to kill a man by shooting through the partition of a room in which he was supposed to be might possibly be held criminal, although if in fact the man were not in the room, such an act might not be an attempt to murder him. So a combination to defraud by means likely to defraud would probably be held criminal, although there were circumstances which would prevent the use of the means in the particular case from being punishable as an attempt. (Cp. 1849. Cluderay, 1 Den. 514. But see 1871. Taylor, as to evidence of a conspiracy to attempt a crime.)

Under this part of this head fall cases of combination to cheat:—

1674. Thody: by false dice.
1704. Orbell: by a bet on a race in which a runner had been bought.
1744. Robinson: by personation.
1782. Hevey: by a sham bill of exchange.
1803. Brisac: by officers by defrauding the government by false vouchers.
1808. Roberts: by passing with tradesmen as persons of fortune.
1816. Pywell: by pretences of the soundness of a horse.
1818. Gill: by false pretences.
1819. Anon.: by means not described.
1824. Whitehead: by false pretences.
1826. Cooke: by false pretences.
1826. Serjeant: by perjury and false pretences to procure a youth of seventeen to marry a woman of ill fame, with intent to defraud him of his property.
1827. Mott: by fabricating shares.
1831. Fowle: by means not stated. (Ruled too general.)
1832. Jones: by putting away the goods of an insolvent trader. (Ruled not indictable. But see 1857, Hall, *infra*.)
1833. Bloomfield *v.* Blake: by pretence of legal process.
1833. Levi: by knock-out at an auction.
1834. Richardson: by removing goods pending an order for immediate execution. (Ruled not indictable.)

1836. Hamilton: by false pretences.
1839. Peck: by obtaining goods without paying for them. (Held too general.)
1841. Steel: by false pretences.
1842. Parker: by false pretences.
1843. Kenrick: by false pretences.
1844. Ward: by false pretences.
1844. Blake: by false declarations for the customs.
1844. King: by false pretences. (Pleading.)
1846. Gompertz: by false pretences.
1847. Sydserff: by means not stated. (Held good.)
1849. Wright: by false affidavits for procuring transfer of stock.
1852. Whitehouse: by false pretences.
1852. Rycroft: by means not stated.
1852. Read: by pretences as to soundness of horses.
1853. Yates: by false pretences and extortion.
1854. Carlisle: by false representations.
1856. Bullock: by false pretences.
1857. Stapylton: by publishing fraudulent accounts of a bank.
1857. Hall: by removing goods after an act of bankruptcy.
1858. Timothy: by false representations of profits of a business.
1858. Esdaile (or Brown): by false representations of the solvency of a bank.
1859. Absolon: by transferring railway tickets which were not transferable.
1860. Hudson: by fraudulent gambling.
1864. Latham: by false pretences.
1864. Knowlden: by means not stated.
1865. Barry: by falsely pretending to an insurance office that certain goods had been burnt.
1865. Burch: by publishing a fraudulent balance sheet.
1869. Lewis: by a mock auction.
1869. Gurney: by a fraudulent prospectus of a projected company, and by false accounts (24 & 25 Vict. c. 96, s. 94). (Acquitted.)
1870. Warburton: by false accounts between partners.

§ 11. *Examination of the Cases on Combination to injure Individuals (otherwise than by Fraud).*

The origin of the suggestion, that combinations to injure private persons may be criminal, although the proposed means of injury would not be criminal apart from combination, may be traced partly to a misapprehension of the ground of the determination in Starling's Case (1665), partly to an application of the analogy of the

law of combinations to defraud, partly to the passage in Hawkins (1, 72, 2; published 1717), in which it was stated, that "there can be no doubt but that all confederacies whatever wrongfully to prejudice a third person, are highly criminal at common law." Hawkins' authorities for this proposition consist of seven cases on maintenance and conspiracy (properly so called) within the ordinances of conspirators (1354. Art. of Inq.; 1607. Lord Gray of Groby; 1611. Poulterers' Case; 1663. Timberley; 1678. Armstrong; 1699. Savile *v.* Roberts, on the civil writ of conspiracy, and 1705. Best), and of Starling's Case (1665), which is stated below (*f*). In none of these cases is there any decision which tends to establish his proposition, but at most some arguments of counsel, and some general expressions attributed to the courts, which will be found examined below (§ 14, n.). It is now to be inquired how far this doctrine is confirmed or negatived by decisions; and for this purpose it is necessary to enter into greater detail than has been necessary in former subsections. And first with respect to express decisions:—

1351. Anon. Combination for false imprisonment and extortion held not indictable as a conspiracy; being only damage and oppression. See the case in App. II. *inf.*

1665. Starling. In the Case of the Brewers of London (*sup.* § 7), the jury convicted the defendants of having confederated to depauperate the farmers of excise. During several debates on motion in arrest of judgment, it was argued for the crown that this was sufficient; but no intimation appears in any report that the court acceded to this view. On the contrary, it was long before they were able to determine that the judgment ought to stand; and they at length supported it only on the ground that the indictment alleged that the excise had been settled on the king as a part of his revenue, and that to depauperate the farmers must have the effect of disabling them from rendering him his revenue. In Daniell's Case (1704), Lord Holt, after agreeing that it was not criminal to combine not to deal with a tradesman, and denying that it was not criminal to combine to rob or murder, explained the exceptional ground on which the judgment in this case rested (*sup.* § 7). Starling's Case, being after verdict, appears to amount to a decision that a combination to impoverish a man (other than the king) by means not criminal in themselves, is not criminal. See the case in App. II. *inf.*

(*f*) His later editors add—1719. Cope; 1721. Tailors of Cambridge; 1725. Edwards; which are also considered below.

1865. Salter. Here the indictment was quashed on motion, but no inference can be drawn from this case, because there was plainly neither any indictable offence, nor any combination. The words "*per conspirationem*" were inserted, according to the practice of that date, merely by way of aggravation, or as being equivalent to "contriving."

1719. Cope. Here the defendants had bribed a cardmaker's apprentice to spoil his master's cards by putting grease into them. It seems clear that at that date such an act was punishable in the apprentice (see 1727. Edmonds, 1 Sess. Ca. 288, p. 357; and by Powell and Gould, J. J., in 1704. Daniell; and cp. 1848. Button; and 5 Eliz. c. 4, s. 35); and if so, then according to the principles explained in R. *v.* Higgins (1801. 2 East, Rep. 5), the conduct of each of the defendants was criminal independently of the conspiracy.

1725. Edwards. Here the combination was to charge the inhabitants of a parish to their prejudice, by bribing a poor man settled there to marry a poor woman with child of a bastard. It was urged by Serj. Comyns for the crown (apparently citing from Hawkins), that "a bare contrivance to act to the prejudice of another is criminal." The case was twice argued; first on motion to quash the indictment, and again on demurrer. The King's Bench refused to quash the indictment on motion, because it was not the practice to quash indictments on motion in cases of any doubt, if an ill design appeared in the defendants. Lord Raymond, C. J., said, "Indictments for conspiracies are not allowed to be quashed, where the thing that is conspired is in its own nature criminal. But where it plainly appears by the indictment that the act which was done to the prejudice of another was a lawful act, the court hath a discretionary power to quash. If it be doubtful whether the act done be criminal or not, yet if it be done with an ill intent or design, we will not quash the indictment. I am of opinion the indictment in this case ought not to be quashed; but the defendants must be left to demur or plead to it, as they think fit." But on demurrer, "it was held not an indictable offence." In another report the determination reported is, "and on demurrer *judicium pro defendente*, because not an offence indictable."

1752. Chetwynd *v.* Lindon. Here Lord Hardwicke thought that a combination to set up a supposititious child as a legitimate one, so as to impede the course of descent in law, and defeat the heir-at-law, might perhaps be indictable; but that where the combination was to set up a child as the illigitimate child of a man who desired to have a child by the woman whom he kept, the object was a merely private grievance, and the combination was therefore not criminal.

1775. Leigh. Here the combination was by hissing and riot to prevent the actor Macklin from playing. The defendants were convicted, but the matter being settled, no judgment was passed; and therefore, as the learned reporters of Manning & Grainger's Reports (6 M. & G. 217, n.) observe, "the defendants had no opportunity, if they had been so advised, of questioning the sufficiency of the indictment by a motion in arrest of judgment." Moreover it is doubtful whether the indictment (which is set out in 4 Wentw. Pl. 443) in this case was for a conspiracy. The charge laid in each count is riot and obstruction of the play. Words of conspiracy do not appear in any count but the first, and there only in the inducements. So the

reporters in 1 C. & K. (28, n.) observe that, "although this case is commonly cited as one of indictment for conspiracy, there was no count in which a conspiracy is charged as the *corpus delicti*," and that "the first count is the only one in which anything at all touching on conspiracy occurs." In a civil action of assault in 1809 (Clifford *v.* Brandon), Sir J. Mansfield is reported to have said, that "if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy:" but it is not unreasonable to suppose that this opinion (which was not necessary for the decision of the case) was founded on some statements (by counsel *arguendo* in Mawbey, 1796) as to the effect of this case, which were anterior to the publication of any report of it. In Gregory *v.* The Duke of Brunswick (1843), the action was for damages for a combination to hiss an actor; and nothing appears to have been suggested by the court at nisi prius or in banc as to the criminality of such a combination.

1783. Eccles. See this case below, § 13, cases on trade.

1783. Compton. The expression of opinion in this case was inconsistent with the decision in Edwards' Case (*sup.*), and must be taken to be overruled by the cases of Fowler (1788) and Seward 1834), *inf.*

1788. Fowler. Here the combination was to burden a parish by bribing a poor man there, who had got a poor woman of another parish with child, to marry the woman. Buller, J., ruled that it was essential that there should have been "some violence, threat or contrivance," or "some sinister means," and further that the marriage should have been forced on the parties against their will:—a rule which clearly brings the case within the decisions that it is indictable, independently of combination, to make persons marry by force or threats or fraud. (1670. Parris, 1 Sid. 431; 1732. Parkins, 1 Sess. Ca. 176, p. 213.)

1792. Parkhouse. It was ruled that upon an indictment for combination to charge a parish by forcing paupers to marry by threats and menaces against the peace, although it need not be averred that the marriage was against their will, this must be proved.

1811. Turner. Here the combination was to trespass with arms by night in pursuit of hares. This case occurred before the passing of the first Night Poaching Act (1817, 57 Geo. 3, c. 90), and the K. B. (Lord Ellenborough, C. J., Le Blanc, Bayley and Grose, JJ.) held that this combination was not indictable, inasmuch as it was merely for a civil trespass. (See the case in App. II.) The decision was wrong, because the combination was for acts amounting in law to the crime of unlawful assembly with intent to resist apprehension, and *in terrorem* (1816. Brodribb); but the principle of the decision has been approved (1834. Seward, by Taunton, J.; 1843. Kenrick, by Lord Denman, C. J., *pro cur.*) even by the judges who questioned the particular application of it, and the disapproval expressed by Lord Campbell in Rowland's Case (1851) was expressly put on the ground that the combination was for an indictable offence.

1826. Cooke. This case is here mentioned because the indictment contained averments of an intent to disquiet and disturb a person in the possession of his estates. But it also averred an intent to obtain money by false pretences. The case is reported only for a point of

procedure, and no observations were made upon the nature of the offence.

1834. Seward. Here the combination was to burden a parish by bribing a poor man settled there to marry a poor woman with child. The K. B. arrested judgment and affirmed the ruling in Fowler's Case. Lord Campbell, C. J., said, "An indictment for a conspiracy ought to show, either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means: that is not done here . . . When it is said that such a proceeding is a conspiracy, because it is to be carried into effect by unlawful means, we must see in the means stated something which amounts to an offence." Taunton, J.: "Merely persuading an unmarried man and woman in poor circumstances to contract matrimony is not an offence. If indeed it were done by unfair and undue means, it might be unlawful; but that is not stated. There is no averment that the parties were unwilling, or that the marriage was brought about by any fraud, stratagem, or concealment, or by duress or threat. No unlawful means are stated, and the thing in itself is not an offence." (See *sup.* in 1788. Fowler.)

These authorities on the whole strongly favour the view that a combination to injure a private person (otherwise than by fraud) is not as a general rule criminal unless criminal means are to be used. At the same time expressions are to be found in some cases which imply a doubt as to the universality of the rule.

In Stratton's Case (1809), where the indictment was for a combination for false and malicious prosecution, the indictment also alleged an intent to deprive the prosecutor of his office. In Kenrick's Case in 1843, Lord Denman said, "If in the case of R. *v.* Turner, the meditated injury, instead of ending with the trespass, had been planned for the purpose of seizing the landowner, or driving him from the country, we have no reason to think that the learned judge would have condemned an indictment for a conspiracy to effect that object." In Rowlands' Case (1851), during the argument it was asked whether a combination to entice away workmen was indictable. Lord Campbell said, "Would it not be indictable, if it were done for the purpose of ruining a tradesman?" In Duffield's Case (1851), Erle, J., is represented to have said during the argument, with reference to Turner's Case, "A conspiracy to injure a man in his private property; a conspiracy to prevent all customers coming to his shop—what is that but a civil injury? A conspiracy to injure—two men combining to interfere with a man's civil right—is indictable." In Rowlands' Case (1851), the same judge, after stating that it was lawful for persons to combine for their own benefit, added, "But I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine, a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have

for their immediate purpose the hurt of another." Lastly, in Lumley *v.* Gye (1853), where the question was, whether an action lay for maliciously inducing a singer to break her contract, Crompton, J., said: "Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party, I am by no means prepared to say that an action could not be maintained, and that damages beyond the amount of the debt, if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such an injury, an indictment or a writ of conspiracy at common law might perhaps be maintained."

In Wentworth's Precedents (vol. 4, p. 105), there is a precedent of an indictment (A.D. 1788-9) for a combination to impoverish R. Meux, and to ruin him in his trade of a common brewer, by persuading his customers to leave him. In the same book (vol. 6, p. 439) there is an indictment for a combination to ruin a gun-manufacturer by raising riots, and by seducing away his workmen, and by violence to his servants. The latter indictment is clearly good on the grounds of the riot and violence, though probably not so on the ground of seduction of workmen (see 1704. Best; 1851. Rowlands). The former precedent may well be questioned. Had a case of so much importance been tried, it would probably have been reported; and the old books of precedents include many indictments which modern decisions have deprived of such authority as they may once have had.

It is conceived that these expressions—for the most part amounting only to a question or a doubt—are not sufficient to establish exceptions to the principles involved in the decisions set out in the earlier part of this subsection. Exceptions may perhaps be established by future decisions, but in the meantime it seems impossible to discover any clear rule by which it can be known beforehand what the nature of those exceptions may be. This difficulty presses on the law of conspiracy wherever it goes beyond the plain lines of the ordinary criminal law, and would perhaps be greatest in the case of any such extension at this point.

The late Serjeant Talfourd, in his edition of Dick. Q. S., at p. 335, makes the following observations on this subject:—"It is not easy to understand on what principle conspiracies have been holden indictable, where neither the end nor the means are in themselves regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime; for associations to prosecute felons, and even to put the law in force against political offenders, have been holden legal (1823. Murray, at Guildhall, Abbott C. J.). If then there be no indictable offence in the object, no indictable offence in the means, and no indictable offence in the con-

cert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another the evidence of the means; while at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless.

"The utmost limit of the modern doctrine of conspiracy seems to be reached in the decisions respecting concerted disapprobation of a performer or a piece at a theatre." [He then cites Sir J. Mansfield's observation in Clifford *v.* Brandon, and continues:—] "In this case the act is lawful; the means are lawful; the motive may be even laudable; as if a notoriously immoral piece were announced, and the parties determined to oppose it; and yet the concert alone makes the crime. It is extremely difficult to understand this, unless concert be a crime; and still more difficult to reconcile it, or many other of the cases, to the decision of the King's Bench in 1811 (Turner)."

See as to combinations to break contracts, *inf.* § 13.

§ 12. *Examination of Cases on Combination relating to Trade and Labour.*—(1) *Restraint of Trade and Disturbance of Markets.*

Some traces may be found in the ancient books of a doctrine that it may be criminal, independently of combination, for one man to oblige another (by bond or otherwise) to abstain from the exercise of his proper craft or employment (Yearb. 2 Hen. 5, 5 *b*, 22, set out in 11 Rep. p. 53 *b*, and in 1 Sm. L. C., Mitchell *v.* Reynolds; Anon. 2 Leon. 210, on the authority of the former case); and if this was the law it would follow that a combination for the like purpose might be criminal. A more general doctrine was several times suggested by Crompton, J. (*e. g.* 1856. Hilton *v.* Eckersley), that all "agreements tending directly to impede and interfere with the free course of trade and manufacture" were not only illegal in the sense that they could not be enforced, but criminal combinations. It does not appear that this doctrine ever received the assent of other judges. Lord Campbell, C. J. and Erle, J. in the case cited disapproved it. The Exchequer

Chamber in the same case, and the Q. B. in Hornby *v.* Close (1867) declined to express an opinion upon it; in the numerous cases of indictments of workmen for combinations of various prohibited kinds, no suggestion appears ever to have been made that it could be applied; and it has been usual to admit the right of workmen to strike and of employers to lock out in combination. The question is now concluded by the 34 & 35 Vict. cc. 31, 32, as to combinations of employers and workmen, and it is not likely to occur in any other case. Should it become necessary to determine the question, it is conceived that it must be held that up to the present time the doctrine has not been established by any binding authority. Moreover the civil courts have in modern times gone very far in holding that agreements between individuals in restraint of the trade of one of them may be not only not criminal but legal and enforceable; and a rule which is so vague and subject to such wide and undefined exceptions does not appear to be properly the matter of criminal law.

Disturbances of the public markets, of prices of goods and of labour, have in like manner been sometimes regarded as criminal independently of combination, and of the numerous statutes for prohibiting them (Cp. 1369. Lumbard's Case; 1636. Midwinter, where nothing seems to have been said of the combination; 1818. Hilbers; Cp. 1800. Waddington, 1 East, Rep. 143; 1814. De Berenger); and there are some cases of indictments for combinations expressly prohibited by statutes as combinations for these purposes. (1698. Anon.; 1758. Norris). All the ancient acts have now been repealed; but the 7 & 8 Vict. c. 24, which repealed the statutes relating to forestalling, engrossing and regrating, and also extinguished their criminality at common law, enacted by sect. 4, that nothing in its provisions should "apply to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decoy the price of any goods or merchandize, or to the offence of preventing

or endeavouring to prevent by force or threats any goods, wares or merchandize being brought to any fair or market, but that every such offence may be inquired of, tried and punished as if this act had not been passed." (See 1800. Waddington, 1 East, Rep. 143; 1814. De Berenger.)

There is a case of some importance (1783. Eccles), which seems to have proceeded partly on the ground suggested by the ancient cases on restraint of trade, partly on the ground of disturbance of the markets or prices.

Several defendants (apparently master tailors) were indicted for combining to impoverish and prevent the prosecutor (apparently a rival master tailor) from trading. The indictment did not set out the proposed means; and the question was, whether it was sufficient. The K. B. held that it was sufficient; but on what ground, does not clearly appear. Lord Mansfield is reported to have said, "The illegal combination is the *git* of the offence. Persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence." Lord Ellenborough, in Turner's Case (1811), said that this case seemed to have been determined on the ground of restraint of trade. It may, however, be doubted whether the language of the court does not show that it proceeded on the ground of an assumed combination to disturb prices. If it proceeded on the ground of the intent to "impoverish," it is opposed to Starling's Case (1665), and apparently also to Rowlands' Case (1851), and since the last case the decision on the sufficiency of the declaration seems questionable.

§ 13. *Examination of Cases as to Trade and Labour continued.*—(2) *Coercion of Individuals.*

The last special group consists of the cases on combinations by workmen to regulate the conditions of their labour. These cases, with few (if any) exceptions, have been instances either of combinations for purposes the combining for which was expressly prohibited by statutes now repealed, or of combinations to do what it was punishable for one man to do without combination. In

so far as the cases in this group fall within either of these descriptions, they are merely examples of indictments for combination to break statutes or otherwise to commit offences—either offences the gist of which was defined by the statute creating them as depending on the combination, or acts punishable when done by an individual, as the case may be. In either kind the combination was criminal at common law in the sense already described—the sense in which any combination to commit any offence is said to be criminal at common law, although the offence was created by statute; namely, that the indictment need not conclude *contra formam statuti*, and that the design need not have been completely executed, and that the punishment does not depend on the statute.

But there are cases in which it is suggested that some combinations of the kind in question are indictable at common law in another sense, neither as agreements for a combination expressly prohibited by a statute, nor as combinations to do what would be punishable if done by one man, but as being substantive crimes at common law, in the same sense in which thefts always were crimes at common law, or in which it has become established that combinations to defraud may be crimes at common law although the proposed fraud is not such as would be punishable in an individual. It seems at one period of the present century to have been doubted by some judges whether all combinations of workmen for altering the conditions of labour were not criminal at common law in this sense. But this doubt appears to have been based on the doctrine of restraint of trade, and it may probably now be disregarded. Again, in cases of the present century some authority will be found for the view that combinations for the purpose of coercing a workman in respect of his freedom of industry, or a master in respect of the management of his business, may be criminal at common law in the same sense, although the coercion was to be of that negative kind which consists in the mere combined absten-

tion from work without breach of contract and without any express threat or intimation of the purpose by word or positive act to the workman or master. The only decision of a superior court which appears at all to favour this view is the decision of the K. B. in the case of Walsby *v.* Anley (1861), where the question was whether a threat of a strike against non-unionists could be a "threat" within the meaning of the now repealed act 6 Geo. 4, c. 120. The court seem to have thought that "threat" must mean a threat of something "illegal," and that a strike (not in breach of contract) for the purpose of compelling the dis charge of the non-unionists would be sufficiently "illegal" to bring the threat of it within the statute. Crompton, J., who appears to have thought that all strikes were criminal, said that such a strike would be criminal at common law, and Hill, J., seems to have adopted the same view. Cockburn, C. J., seems to have guarded himself in this case (as he did in a subsequent case—Wood *v.* Bowron, 1866) from saying that they would be criminal. The decision in Walsby *v.* Anley, that a threat of a strike might be a sufficient "threat" within the meaning of the statute, whether it proceeded on the ground of restraint of trade or on some other ground, was followed in several subsequent cases; but in none of them does it appear to have been supposed that that case established the criminality of such a combination at common law. On the contrary, the K. B., in 1866 (Wood *v.* Bowron), said that this was still a question; in Druitt's Case (1867) Bramwell, B., said that strikes to raise, or lockouts to lower wages were lawful; and, in 1868 (Sheridan), Lush, J., is reported to have ruled that there was nothing criminal in a combination to enforce by strike, without intimidation, &c., the compliance by a master with arbitrary rules of a trades union. So, in an earlier case (1847. Selsby), Rolfe, B., had ruled that there was nothing criminal in a combination to strike for higher wages or against apprentices and non-unionists, in the absence of "intimidation," "mo-

lestation," &c. It appears, indeed, to be plain that there could not have been any occasion in Walsby *v.* Anley to hold that such a strike would be criminal; for not only had a threat, obviously not of anything criminal, been held sufficient in Perham's Case (1859), but if that had been necessary for holding a threat of a strike to be a "threat" within the meaning of the statute, it would have followed that an "intimidation," or "molestation," or "obstruction," in order to be within the statute, must be an intimidation, or molestation, or obstruction, by threat or execution of a criminal act—a construction which was never suggested, and which would have made the statute inoperative. On the whole, it is conceived that the preponderence of authority is strongly against the general view which has now been considered.

Lastly, there are some cases which appear to favour a view that a combination is criminal at common law in the sense now in question, if it is for something which may perhaps be designated as active coercion of a man's freedom of industry or occupation, but which may best be indicated in the words of the cases—

1832. Bykerdike. Workmen combined under oaths to send a letter to an employer, to the effect that all his men would strike in fourteen days unless certain workmen were discharged. Patteson, J., is said to have told the jury that the statute 6 Geo. 4, c. 129, "never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal."

[The report of this case is brief and ambiguous. It cannot be clearly determined whether any reference to common law was meant. The first count seems to have been intended to be framed on the statute; but since Rowlands' Case (1851), both counts are questionable. The case seems to be reported only for a point of pleading.]

1867. Druitt. Workmen on strike for higher wages combined to prevent other men from going to work, by picketing the works and by molestations. Bramwell, B., is reported to have ruled, that, even independently of the statute 6 Geo. 4, c. 129 (on which fifteen counts of the indictment were framed), that "if any set of men agreed among themselves to coerce that liberty of mind and thought [sc. "the liberty of a man's liberty of mind and will to say how he should bestow himself and his means, his talents and his industry"] by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and

freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon; and he laid it down as clear and undoubted law, that if two or more persons agreed that they would by such means co-operate together against that liberty, they would be guilty of an indictable offence. The public had an interest in the way in which a man disposed of his industry and capital; and if two or more persons conspired by threats, intimidation or molestation to deter or influence him in the way in which he should employ his industry or his talents or his capital, they would be guilty of a criminal offence. That was the common law of the land, and it had been, in his opinion, re-enacted by an act of parliament" (6 Geo. 4, c. 129). The learned judge added, that in his opinion it was "impossible to have an effectual system of picketing without being guilty of that alarm and intimidation and obstruction which is a breach of the law."

1872. Bunn. This case occurred after the passing of the 34 & 35 Vict. c. 32, which repealed the 6 Geo. 4, c. 129 and substituted new provisions respecting violence, threats, molestation and obstruction. Here the combination appears to have been to compel a master, by means of a strike, to take back a discharged workman. The strike was on the part of the defendants, and of some of the other men who struck, a breach of written contracts. The case appears not yet to have been reported in any of the law reports. According to such reports as have been published, it appears that no facts amounting to any offence within the 34 & 35 Vict. c. 32, were established; but that the circumstances of the case in respect of the master's known engagements, and of the inconvenience which must result to the public from the interruption of his business (the manufacture of gas for the service of a part of the metropolis), were such that a strike, or threat of a strike in breach of contract, must have an extraordinarily coercive effect upon him. The learned judge is stated to have told the jury, in substance, that the indictment charged a criminal combination in two forms. The first was a combination to force "the company to conduct the business of the company contrary to their will by an improper threat or molestation. There would be improper molestation if there was anything done to cause annoyance or in the way of unjustifiable interference, which in the judgment of the jury would have the effect of annoying or interfering with the minds of ordinary persons carrying on such a business as that of a gas company. It was enough if they thought there was molestation intended and agreed upon with an improper intent, which, in their judgment, would be an annoyance and an unjustifiable interference with the business and have a deterring effect on the minds of Mr. Trewby and the company." The second was a combination to hinder or prevent the company, by simultaneous breach of contract, from carrying on their business. The jury acquitted the defendants on the counts for combination of the former kind, but convicted them on the counts for combination of the second kind.

Against these two rulings (*g*) (or three, if Bykerdike's

(*g*) There are expressions somewhat similar in 1851. Hewitt.

Case is to be so understood) are to be set Selsby's Case in 1847, in which Rolfe, B. (Lord Cranworth) seems to have ruled that there was no common law on the subject, and that a strike for higher wages or against apprentices and non-unionists was lawful, unless violence, threats, molestations, &c. within the meaning of the statute were used ;— Sheridan's Case in 1868, in which Lush, J. is said (in a newspaper report) to have ruled that there was nothing unlawful either in a strike for compelling a master to comply with certain regulations, or in informing him of the object of the strike or in picketing his premises, so long as there was no violence or intimidation, &c. (*h*) ;— and Shepherd's Case in 1869, in which the same judge ruled that a combination to strike for wages and to picket premises was not criminal, and distinguished Druitt's Case on the ground that there the defendants "abused their fellow workmen, shouted and hooted at them, and were otherwise violent in their conduct."

It is to be regretted that neither in Druitt's Case nor in Bunn's Case was there any apparent opportunity of obtaining a confirmation or explanation of the rules laid down for the guidance of the jury by appeal on a case reserved for the Court of Criminal Appeal. In Druitt's Case all the defendants, except one who had committed an assault, were discharged on their own recognizances, and they therefore had no motive to appeal. In Bunn's Case the same result followed from the acquittal on the charges to which the reported ruling, in so far as it is now in question, applied. It therefore becomes necessary further to consider the doctrine, that a combination to coerce a man's freedom in respect of the bestowal of his industry or capital, by means which would not be punishable apart

(*h*) This ruling is not inconsistent with the cases of Rowlands and of Duffield in 1851, in which it was ruled, that striking, or procuring men to strike *in breach of contract*, was a "molestation" within the statute. There the breach of contract was a breach of a penal act (4 Geo. 4, c. 34).

from combination, is a criminal conspiracy "at common law" (*i*).

[1200—1600.] Firstly, with respect to the period from the commencement of our legal history down to 1600, there appears to be no evidence of the existence of this doctrine; and it seems even to be demonstrable that the doctrine cannot have then existed, for it was only in the Poulterers' Case (1611), or in the glosses afterwards put upon that case, that the general principle was discovered that a combination to commit even a crime was criminal; and the conclusion, that a combination for acts not criminal was not indictable as a combination by the old common law, not only seems to follow from that fact, but appears to be directly proved by the case in 1351 (Anon.). Moreover, the ancient acts relating to combinations of workmen (1360, 34 Edw. 3, c. 9; 1423, 3 Hen. 6, c. 1; 1548, 2 & 3 Edw. 6, c. 15) contain no indication that they are declaratory; nor do they appear ever to have been so regarded, even by Lord Coke (see *e.g.* 3 Inst. 99). Nor does any of them contain any provision against coercion of masters or workmen: and their purview appears to be limited to the prevention of increase of wages, whether by nominal increase or by reduction of hours. Lastly, in none of the books before 1600 does there appear to be any title or mention of combinations or confederacies relating to workmen or to trade except references to these statutes. Ashe's Index to the Common Law (1614) contains the head "How Conspiracies and Confederacies used and made between Artificers or, &c., to sell their Wares or Merchandize, &c., shall be punished. See tit. Statutes, 606, and Bakers, 2,"—both which references are to the 2 & 3 Edw. 6, c. 15. His title "Labourers" consists of thirteen columns of references arranged under various heads, none

(*i*) The question here is, whether and in what sense the doctrine now forms a part of the existing law; and not whether it ought to form a part of the criminal law.

of which have any bearing on this question. Lastly, Pulton, writing in 1610, dilates at length on threats and oppressions, but all his observations on threats refer to menaces of breach of the peace, and none of his "oppressions" have reference to any kind of combination, excepting riot.

[1600—1700.] Secondly, with respect to the 17th century, it may be said, that notwithstanding the great extension of the criminal law in that period, firstly by the Star Chamber and afterwards by the courts of common law, there is no evidence of the existence then of the doctrine in question. The only precedents of that century of a proceeding by way of indictment for conspiracy for offences relating to trade or labour relate to prices (West's Symb. 2, 98, A.D. 1641; Anon. 1698); and of these the former concludes *contra formam statutorum;* sc. 25 Hen. 8, c. 2; 2 & 3 Edw. 6, c. 15.

[1700—1824.] In a third period may conveniently be comprehended the interval between 1700 and 1824—the year in which the Combination Acts were first repealed. The sources to be consulted for this period consist of (i) cases, (ii) precedents, (iii) text books, and (iv) the statutes. (i) The cases before the act 39 & 40 Geo. 3, c. 109, with the exception of Eccles' Case, consist exclusively of cases of indictments for or expressions relating to combinations to raise wages—combinations which were then doubly criminal, firstly, as being in violation of the general statute 2 & 3 Edw. 6, c. 15, against combinations for raising wages; and, secondly, as being in violation of the statutes, such as 1 Jac. 1, c. 6, for the regulation of wages by justices; and sometimes further criminal by special laws to the same effect for governing particular trades. The cases are as follow:—

1721. Journeymen Tailors of Cambridge. The tailors were indicted for combining to raise their wages. It was objected that the indictment ought to have concluded *contra formam statuti*, since it depended on 7 Geo. 3, c. 13, which provided for the punishment of tailors for making agreements to advance their wages. It appears

to have been admitted by the counsel for the crown that the offence consisted in combining to demand wages in excess of those allowed by the act (—"'tis true, it doth not appear by the record, that the wages demanded were excessive. but that is not material, because it may be given in evidence"); but they contended that the gist was in the conspiracy, and so the crime charged was a crime at common law; a contention which was in accordance with the Poulterers' Case (1611) and with Best's Case (1705), and which did not involve that the combination would have been criminal if it had not been for a pnrpose criminal apart from combination. The court held, in accordance with the former authorities, that the indictment need not conclude *contra formam statuti;* and they are made to add that "a conspiracy of any kind is illegal, tho' the matter about which they conspired might have been lawful for them or any of them to do, if they had not conspired to do it; and this appeared in the case of the tub-women against the brewers of London." This general expression was in no way necessary for the decision; it is not supported by its reference (1665. Starling, see *sup.* § 7); and it amounts to the proposition, which is negatived by every previous and subsequent authority, that combination is *per se* criminal, independently of its purposes. Moreover, that the report is untrustworthy appears from the fact that the reporter makes the arguments as to a case at Cambridge turn on the 7 Geo. 1, c. 13, which did not apply to Cambridge, but only to the metropolis.

1783. Eccles. This case has already been considered above, § 12; and it appears not to bear on the present question.

1796. Mawbey. The indictment was against justices for attempting to pervert justice and influence the Court of King's Bench by false certificates. Grose, J., said, "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy."

[These expressions were not necessary for a decision upon an indictment for a combination to pervert justice. Crompton, J., several times cited them with approval. Lord Campbell, C. J., in 1856, Hilton *v.* Eckersley, ranked them with other "loose expressions" which he disapproved. Sir W. Erle, in his Memorandum on Trades Unions, Rep. App. lxxvi, says, that so far as the dictum related to wages, "it was relevant only for the purpose of establishing that the guilt of conspiracy is complete by the agreement;" and with reference to the more general part of this dictum, and to the dictum in the Tailors of Cambridge Case, he says, "The dicta in the two last cases, that acts lawful for one may become indictable if more than one combine to commit them, were not pertinent to the adjudication then being made. The judges do not refer to examples, and although the proposition may be true of cases where simultaneity is the essence of the criminality of the act, I cannot discover any other cases in which it would be true."]

1799. Hammond. Journeymen shoemakers were convicted of a combination to raise wages; and Lord Kenyon said, that not only

was such a combination by the men indictable, but it would be indictable in the masters to agree to *raise* wages. It seems impossible but that such an observation must have referred to the statutory prohibitions (5 Eliz. c. 4; 8 Geo. 3, c. 17, &c.) of the payment by masters of higher wages than those fixed by the justices—prohibitions which were not repealed until 1813.

1804. Salter. Indictment framed on 39 & 40 Geo. 3, c. 106, for conspiring to compel a master to discharge a workman by striking in breach of contract. Nothing appears as to common law.

1819. Ferguson. Indictment framed on 39 & 40 Geo. 3, c. 106, for conspiring to strike against employment of apprentices. Nothing appears as to common law.

The doctrine in question does not appear to be asserted or involved in any of these cases, unless in so far as it may be included in the general dicta attributed to the judges in the Tailors' Case and in Mawbey's Case. Next (ii) are the precedents. In Wentworth's Pleadings, published in 1797, the precedents bearing on this question, with one exception, can be traced to and follow the language of statutes; and that one appears to follow the language of some statute which has not been found.

1760. 4 Wentw. p. 103: combination by journeymen tailors in London to raise wages and lessen hours contrary to the orders of the justices. (7 Geo. 1, c. 13.)

1782. Ib. p. 100: by journeymen leather dressers against apprentices. (22 Geo. 2, c. 27, s. 12; 12 Geo. 1, c. 34.)

1787. Ib. p. 113: by smiths to lessen hours. (22 Geo. 2, c. 27, s. 12; 12 Geo. 1, c. 34.)

1792. Ib. p. 120: by curriers to raise wages. (22 Geo. 2, c. 27, s. 12; 12 Geo. 1, c. 34.)

1793. 6 Wentw. p. 375: by journeymen lamplighters to raise wages. (This precedent appears to follow the language of some statute, though the statute has not been found. The general Acts, 1 Jac. 1, c. 6, or 2 & 3 Edw. 6, c. 15, may have been relied on.)

Other similar precedents which can equally be traced to statutes which they follow, but do not mention, will be found in other later collections. (Dickenson, Q. S.; Chitty, Cr. L.; Cro. Circ. C.) There are two to which no statute seems to apply, viz., an indictment against master-shoemakers for conspiring not to employ journeymen who had left their last masters without their consent (Dick. Q. S. 283 or 341); and an indictment (3 Chit.

Cr. L. 1169) against master-ropemakers for the like offence. (The dates of these two precedents are not given; but since they are not included in Wentworth, they are probably of a later date than 1797. The latter is said to be "from the MS. of a gentleman at the bar.") The editors of some of these collections prefix the description "at common law" to most of the precedents, apparently in the sense that they understand the combinations to be indictable irrespectively of the statutes; but this can hardly countervail the fact that, with few exceptions, the precedents are confined to cases met by statutes, and follow the language of statutes; and it is easy to understand how the established practice that indictments for conspiracy do not conclude *contra formam statuti* even when they are founded on statutes may have led to the impression that the criminality was independent of the statutes. No case or precedent of an indictment for controlling a master appears until 1780, *i. e.* until statutes expressly directed against combinations for this purpose had been in force for fifty-five years (12 Geo. 1, c. 34, &c.)

The text books (iii) down to at least 1800 appear to be silent as to the existence of any doctrine of the criminality at common law of combinations of masters or workmen. Neither in the earlier editions of Hawkins nor in East does the doctrine in question appear to be stated. So in the edition of Burn's Justice of 1810, it is not mentioned under the title "Conspiracy;" and under the title "Servants," there are several statements of the statutes against combination, but there is no reference to common law. Lastly (iv) the various acts against combinations for controlling masters or workmen which were passed in the 18th century (1725. 12 Geo. 1, c. 34, extended by 1729. 22 Geo. 2, c. 27, s. 12; 1799. 39 Geo. 3, c. 81; 1800. 39 & 40 Geo. 3, c. 106, &c.) commence by declaring or enacting agreements for such purposes theretofore made to be "illegal, null and void;" which would not have been necessary if they had been thought to be criminal at

common law; and they then proceed by independent enactments to make it punishable for the future to engage in them.

The result of the whole appears to be that there is not sufficient authority for concluding that before the close of the 18th century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where the combination was for some purpose punishable under a statute expressly directed against such combinations, or was for conduct punishable independently of combination. If such a rule is established by the cases decided since the passing in 1825 of the 6 Geo. 4, c. 129, which have been above considered, this would seem to be a modern instance of the growth of a crime at common law by reflection from statutes, and of its survival after the repeal of those statutes, somewhat in the same manner in which combinations for certain kinds of frauds continued to be criminal after those frauds had ceased to be punishable apart from combination.

The Select Committee of the House of Commons in 1824, on the Bill for the Act 5 Geo. 4, c. 95, appear to have thought that combinations of workmen were generally criminal at common law; and they embodied their opinion in provisions repealing the supposed common law. They further repealed, amongst other acts, the 33 Edw. 1, so far as it related to combinations or conspiracies of workmen or other persons to obtain an advance of, or to fix, the rate of wages, &c.—a subject to which that ordinance does not appear to have had, or to have been previously supposed to have had, any relation. The Act of 1824 was repealed by the Act of 1825, 6 Geo. 4, c. 129, which repeats the repeal of 33 Edw. 1, as above.

It seems not impossible that the opinion of the Select Committee may have been founded partly on some decisions in the Scotch Courts on the Common Law of Scotland, which are printed in the Report of the Select Committee (H. C.) of 1824 on Artisans and Machinery (see as to these decisions, and the principle of Scotch law on which they rest, *inf.* Sect. III. § 16); partly, perhaps, on the facts that the precedents do not conclude *contra formam statuti*, and on the general rule that a criminal conspiracy is always described as a crime at common law: a rule which, as has been seen, has nothing to do with the question whether the ground of criminality is a statute or is the common law, and which merely means that assuming the purpose to be sufficiently criminal, whether by statute or by common law, the combination for it may be charged, tried and punished without reference to the statute or law which constitutes the ground of the criminality of the combination.

In the consideration of the criminality of such combinations as those which have lastly been discussed, it must be remembered that there is no intrinsic efficacy in the word "conspiracy," or in the word "confederacy," or in the word "combination." "Conspire" [Lord Campbell said in Hamp's Case, 1852] "is nothing; agreement is the thing." Again, in all the more recent cases, it has been uniformly recognized that a lock-out or a strike, whether for higher wages or against an obnoxious workman, or against refusal to conform to regulations, is not *per se* any offence. (1866. Shelbourne *v.* Oliver; 1866. Wood *v.* Bowron; 1867. Druitt and Bailey; 1868. Sheridan; 1869. Shepherd; 1869. Farrer *v.* Close.) Yet the very meaning of a strike is a combination to cause a master or workman to act in his business or employment in a manner in which he does not wish to act; that is, to coerce him. At what point, then, does the illegality arise? Since the abolition in 1871 of restraint of trade as a possible ground of criminality, the object is not unlawful in any sense, apart from the means to be used, for it is not otherwise unlawful in itself to persuade a master to conform to rules or not to employ apprentices. Next, as to the means. "Coercion" in itself imports nothing objectionable, for, as has been held with respect to "intimidation," "molestation," and "obstruction" (1844. O'Connell in D. P.; 1846. Frost *v.* Lloyd, 9 Q. B. 130; 1851. Rowlands, in *arg.* in Q. B.), such words are not terms of art, and they are consistent with either legality or illegality in the conduct to which they refer. A strike is admitted not to be in itself criminal; nor in the absence of breach of contract is it a civil wrong. If therefore the agreement to strike is the unlawful element, it would seem that it must be so in the sense in which agreements in restraint of trade were unlawful: but by the Act of 1871 that ground is taken away. The only other ground on which a strike has been suggested to be unlawful in this sense is that it is used for coercion in trade or labour: but coercion

itself is a neutral word, and imports nothing objectionable apart from the particular means by which it is to be exercised; and it therefore cannot be brought in aid of the unlawfulness of these means. An agreement therefore of the kind here suggested seems not to satisfy that preliminary condition of unlawfulness either in the end or in the means proposed (*k*), which, according to the authorities on cases of combinations to defraud must be satisfied, at least in matters not directly of a public nature, before any question of criminality arises.

The same reasoning applies to an agreement for the mere intimation of an intended strike, and this indeed seems to have been several times admitted to be lawful: and even if it is to be made in a dictatory or minatory manner, it is difficult to see how this, apart from the repealed statute, and from the doctrine of restraint of trade, can make any difference; for if the matter threatened is not unlawful, and the object is not unlawful, to hold the threat of it unlawful would be opposed to those cases in which it has been held that there must be not only a minatory manner but also unlawful matter. Nor, if neither the object nor the manner, nor the form of the threat, is unlawful, does it seem that it can be made unlawful by reason of the magnitude of the interests involved and the consequent efficacy of the threat. The same principles appear to apply to mere disagreeable names, black looks or other mere annoyances (*l*). There is no intelligible sense in which these things can be called unlawful in themselves apart from statutes, and to say that they are unlawful because they are used for coercion, seems to amount to saying that the means receive a character of unlawfulness from that which depends for its own unlawfulness on them.

It is conceived that the provisions of the Act of 1871 confirm the view here suggested. The legislature must

(*k*) See *inf.* § 14. (*l*) See *sup.*

be supposed to have been aware that the law of criminal agreements relating to trade had at least commonly followed the statutes against trade molestations, and it seems reasonable to infer that the list of trade offences which is included in the statute 34 & 35 Vict. c. 32, was intended to embody all the matters which it was thought proper to make the subjects of a special criminal law relating to the disposal of capital and industry, and for which provision was not made in other acts relating to employers and workmen.

Where however the agreement is for conduct involving a breach of contract by workmen, different considerations occur. Acts have been for many years in force for punishing breaches of contract by workmen of most kinds, and an agreement to break those acts, or to procure a breach of them, may be criminal on the general principle established in the 17th century. A difficulty may indeed occur at the present time from the fact that "The Master and Servant Act, 1867," appears to suspend the provisions of most of the former acts for punishing breaches of contract, and to substitute the discretion of a magistrate as to whether the wrong ought to be regarded as criminal or as merely civil, so that a breach of contract may be thought to be of an indeterminate character, both when it is proposed and when it is executed; nor does there seem to be any case in which the effect of this condition of the law has been considered in its relation to combinations. Either view of its effect is attended with difficulty. On the one hand the provisions of the 19th section, which expressly preserves the procedure by indictment in cases of malicious injury to person or property, may perhaps raise some presumption that procedure by indictment was intended to be excluded in the case of other kinds of misconduct within the purview of the statutes whose penal clauses are suspended. On the other hand it seems unlikely that the legislature should have intended to relieve without express words from the criminality which has long attached to

agreements for breaches of contract where those breaches were in violation of penal acts.

Agreements for breaches of contracts of service in cases to which no penal act applies seem never to have been determined to be criminal. In Rowlands' and Duffield's Cases (1851), and apparently in all the other cases, the contracts, the breaking or the procuring the breach of which was ruled or held to be a "molestation" within the statute 6 Geo. 4, c. 129, were within the purview of penal acts; and in Rowlands' Case the Q. B., without pronouncing a final opinion, thought the following counts for conspiracy "too vague":—

16th. Unlawfully to intimidate, prejudice and oppress one R. P. and one G. P. in their trade and occupation as manufacturers of, &c., and to prevent the workmen of R. P. and G. P. from continuing to work for R. P. and G. P. in their said trade and occupation.

17th. By divers subtle means and devices and wicked arts and practices, to injure and oppress R. P. and G. P. in their trade, business and occupation of manufacturers of, &c., and to induce the workmen of R. P. and G. P. to depart from their hiring, employment and work with R. P. and G. P. before the period of their agreement with R. P. and G. P. was completed.

19th. Unlawfully to intimidate, prejudice and oppress R. P. and G. P. in their trade and occupation of manufacturers of, &c., and to entice and seduce away the workmen of R. P. and G. P. from the employment of R. P. and G. P., and thereby to injure and oppress R. P. and G. P. in their said trade and occupation.

After consideration, Lord Campbell, C.J., *pro cur.*, said, "With respect to the indictment, we all agree in thinking that the 16th, 17th and 19th counts are open to objection as being too vague. We give no final opinion; but on these counts there will be a rule *nisi* to arrest judgment, unless a *nolle prosequi* be entered." The other counts were directly framed either on the 4 Geo. 4, c. 34, or on the 6 Geo. 4, c. 129.

And the opinion of the court seems to have been partly founded on the rule for which the cases of Daniel (1704) and Callingwood (1705) are commonly cited, that indictment does not lie against one for enticing away a servant or apprentice. (Cp. 1853, Lumley *v.* Gye. There is a precedent in West, 2, 269, of an indictment against one for being a *common* procurer of servants to depart from their services.)

The following are cases on the subjects of this and of the preceding subsection:—

1354. Art. of Inq.: recital of a statute against combination by merchants. 27 Edw. 3, stat. 2, c. 3.
1369. The Lumbard: indictment of one (not by way of conspiracy) for disturbing prices. 3 Edw. 3, stat. 2, c. 3; 37 Edw. 3, c. 5.
1597. Anon.: Combination for forestalling. 37 Edw. 3, c. 5; 25 Hen. 8, c. 2.
1636. Midwinter: Disturbance of markets. 37 Edw. 3, c. 5, &c.
1698. Anon.: Combination by manufacturers to raise prices. 37 Edw. 3, c. 5.
1721. Journeymen Tailors of Cambridge: to raise wages. 2 & 3 Edw. 6, c. 15; 1 Jac. 1, c. 6; *Qu.* 7 Geo. 1, c. 13.
1758. Norris: to raise prices of salt. 37 Edw. 3, c. 5; 25 Hen. 8, c. 2; 2 & 3 Edw. 6, c. 15.
1783. Eccles: to prevent a tailor from carrying on his trade. (*Qu.*)
1796. Mawbey: *Dict.* of Grose, J.
1799. Hammond: to raise wages. 2 & 3 Edw. 6, c. 15; 5 Eliz. c. 4; 8 Geo. 3, c. 17.
1802. Marks: unlawful oath by trades unionists. 37 Geo. 3, c. 123; 2 & 3 Edw. 6, c. 15.
1804. Salter: combination to prevent master from employing a workman. 39 & 40 Geo. 3, c. 106.
1805. Nield: summary conviction. 39 & 40 Geo. 3, c. 106.
1818. Hilbers: combination to engross, raise prices, &c. 25 Edw. 3, stat. 3; 37 Edw. 3, c. 5.
1819. Ferguson: to strike in breach of contract against apprentices. 39 & 40 Geo. 3, c. 106.
1822. Ridgway: summary conviction. 39 & 40 Geo. 3, c. 106.
1832. Bykerdike: combination to compel discharge of workmen by threat of strike. (*Qu.* on 6 Geo. 4, c. 129.)
1834. Ball: unlawful oath by trades unionists. 37 Geo. 3, c. 123; 39 Geo. 3, c. 79.
1834. Lovelass: unlawful oath by trades unionists. 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 57 Geo. 3, c. 19.
1834. Dixon: S. P.
1842. Harris: charge of Tindal, C.J. 6 Geo. 4, c. 129.
1847. Selsby: combination against apprentices and non-unionists and for picketing. 6 Geo. 4, c. 129.
1851. Hewitt: strike against a workman. 6 Geo. 4, c. 129.
1851. Rowlands: } strike in breach of contract to raise wages.
1851. Duffield: } 4 Geo. 4, c. 34; 6 Geo. 4, c. 129.
1856. Hilton *v.* Eckersley: bond in restraint of trade.
1859. Perham: summary conviction for threat. 6 Geo. 4, c. 129.
1861. Walsby *v.* Anley: summary conviction for threat of strike. 6 Geo. 4, c. 129.
1863. O'Neill *v.* Longman: summary conviction for threat. 6 Geo. 4, c. 129.
1863. O'Neill *v.* Kruger: summary conviction for threat. 6 Geo. 4, c. 129.

1866. Shelbourne *v.* Oliver: summary conviction for threat. 6 Geo. 4, c. 129.
1866. Wood *v.* Bowron: summary conviction for threat. 6 Geo. 4, c. 129.
1867. Skinner: summary conviction for threat. 6 Geo. 4, c. 129.
1867. Druitt: } combination to molest workmen. 6 Geo. 4,
1867. Bailey: } c. 129. (See as to common law.)
1867. Hornby *v.* Close: restraint of trade.
1868. Springhead Co. *v.* Riley: injunction. Malins, V.C. 6 Geo. 4, c. 129.
1868. Sheridan: combination to enforce rules. 6 Geo. 4, c. 129.
1869. Shepherd: combination to molest workman. 6 Geo. 4, c. 129.
1869. Farrer *v.* Close: restraint of trade.
1872. Bunn: combination to coerce a master in his business.

§ 14. *Summary of this Section—Lord Denman's Antithesis.*

It is conceived that on a review of all the decisions there is a great preponderance of authority in favour of the proposition that, *as a rule*, an agreement or combination is not criminal unless it be for acts or omissions (whether as "ends" or as "means") which would be criminal apart from agreement (see esp. 1725. Edwards; 1788. Fowler; 1811. Turner; 1834. Seward); and that the modern law of conspiracy is in truth merely an extension of the law of attempts, the act of agreement for the criminal purpose being substituted for an actual attempt as the overt act. It has been seen by what steps a beneficial exception has established itself in the case of agreements to defraud, and how the ancient crime of conspiracy, properly so called, has been extended to charges of any kind of crime made for purposes of extortion. Probably also in the case of agreements "directly of a public nature and levelled at the government," and perhaps in the case of agreements to pervert or defeat justice, the law of criminal combinations has gone somewhat beyond the bounds of the ordinary criminal law. In the case of agreements to injure private persons, the balance of decisions seems to incline against any such extension, though expressions of opinion

occur in favour of the possibility of such an extension in cases still to be defined. In the case of agreements to coerce a master or workman in the conduct of his business or in the disposal of his industry, there seems to be recent authority in favour of such an extension, but it has not yet been placed beyond doubt by number of cases or by the authority of a court of appeal; and it has been seen that there is much difficulty in finding authority for such an extension in the common law before the present century.

Expressions of great apparent generality, as to the criminality of combinations in cases not within any of these particular lines of extension, occur in some of the reports; but they will be found nearly always to have been used with reference either to cheats or to the perpetually recurring question, what is the gist of a conspiracy for purposes of pleading, and to have had for the most part a totally different meaning from that which they seem to import when they are cited apart from their context. Especially is this true of the so-called definition of conspiracy, that it consists in the combination for accomplishing an unlawful end, or a lawful end by unlawful means. That antithesis was invented by Lord Denman, in Jones' Case (1832)(*m*), to express the very opposite of that for which it is sometimes cited. The indictment was for a combination to cheat by removing the goods of a person against whom a commission of bankrupt had issued; but it did not show that the commission was valid. It was contended for the crown that the mere purpose to defraud sufficed; but the K. B. held that even in the case of a combination to defraud, in which it is admitted to be unnecessary to show a purpose to effect an object or to use means which would be criminal apart from combination, it was yet necessary that there should

(*m*) Some earlier traces of a similar mode of expression may be found, *e.g.* in 1814. De Berenger, and 1 East, P. C. 462 (where East's observations must be separated from the case to which they are appended).

have been an intention to do some act amounting to at least a civil wrong:—"the indictment ought to charge a conspiracy either to do an unlawful act or a lawful act by unlawful means. Here the indictment charges a conspiracy to remove and conceal the goods of Jones; but if the commission was bad, Jones had a right to remove them." So in Richardson's Case (1834), where the same question occurred, with the substitution of an order for immediate execution instead of the commission of bankrupt, the same point was ruled in the same sense by the same judge. The antithesis is next used in Seward's Case (1834) by the same judge in the K. B. for the same purpose, and in this instance "unlawful" seems to be used in the sense of "criminal." In 1839 (Peck), when Lord Denman's own phrase was attempted to be used before him in a more general sense, as containing not a limitation but a definition of what combinations are criminal, he said, "I do not think the antithesis very correct;" and again in 1844 (King), where the attempt was repeated, he clearly explained the meaning of the phrase as being a limitation and not a definition, by the observation, "the words '*at least*' should accompany that." In 1839 (Vincent, Alderson, B.) and in O'Connell's Case (1844. by Tindal, C. J., in D. P.) the phrase was used with reference to a combination to effect changes in the government by means of physical force, and to excite disaffection. Where the phrase is not used as a limitation, it is commonly used with the emphasis on the word "*combination*," for the purpose merely of enforcing the established doctrine that the gist of a conspiracy, considered as an act, is neither in the mere formation of a criminal purpose nor in its execution, but in the agreement for its execution. An excellent example is to be found in the expression used by Willes, J., in delivering the opinion of the judges in the House of Lords in 1868 (Mulcahy), that "A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act

by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself * * * punishable, if for a *criminal* object or for the use of *criminal* means:"—an example which, in its use of both "unlawful" and "criminal," shows that the antithesis has not, in the most modern times and in the highest court, been understood to involve the doctrine for which the antithesis has been sometimes cited. Nor is it difficult to show that the antithesis cannot be and cannot have been intended to be a complete definition of criminal combination. In order that a phrase may be such a definition, its own terms must be used in a definite sense with reference to the purpose for which the definition is to be used. Therefore, if this phrase is a definition for legal purposes, the word "unlawful" or "illegal" (these words are used interchangeably throughout the cases) must be used in a definite legal sense. But there seem to be only three definite legal senses of the word "unlawful." It may mean criminal, *i. e.* prohibited by way of a criminal sanction or penalty; or it may mean wrongful, *i. e.* prohibited by way of a civil sanction or remedy; or it may be used in that peculiar sense in which it is applied to certain contracts, such as some contracts in restraint of trade and contracts in furtherance of immorality, which the law refuses to enforce. Moreover, in whichever of these senses the word "unlawful" is used, it must, if it is to be the defining word in the definition of criminal combination, mean unlawful with reference to the conduct of an individual; for if it meant unlawful with reference to combination, it would do nothing for defining the meaning of "unlawful" as applied to combinations, and it would be merely a re-statement and not a definition. Now it is plain that, if the phrase in question is the complete definition of a criminal combination, the word "unlawful" does not now denote what would be criminal in an individual; for it is well established that, in the case of cheats and

perhaps in some other cases, it may be criminal to combine to do what it is not criminal for one man to do. Nor does it mean whatever would be wrongful in an individual, so as to subject him to a liability to a civil remedy, for not only is there the express authority of Turner's Case (1811), which has never been questioned on this point, to the contrary effect; but it would be against common sense to hold criminal an agreement between two persons to walk in a park without leave, or to dishonour a bill. Nor does it mean unlawful in the third or neutral sense, for this would exclude combinations to commit crimes, and would include many agreements which may be innocent or even laudable apart from public policy. Nor, since the word when applied to criminal combinations is narrower than it is when used in either of the two latter senses, can it mean "unlawful" in a sense coextensive with an aggregate composed of all three or any two of these senses. The truth is that the word "unlawful," when it is used as coextensive with criminal combination, now includes all criminal purposes and some purposes wrongful but not criminal apart from combination; and it has been made a question whether it does not include some purposes of the third or neutral kind. An expression cannot be the definition of conspiracy, the defining part of which is itself so devoid of definiteness for the purposes for which a definition is required.

Nevertheless, there is much value in the phrase for the purposes to which it has commonly been applied by the judges, viz. to indicate—

a. On the one hand, that mere combination is not in itself criminal, but must, if it is to be regarded as criminal, *at least* be for purposes (as "ends" or as "means") which are in themselves in some sense unlawful independently of combination;

b. On the other hand, that, assuming purposes sufficiently "unlawful" in themselves, the gist of the crime of criminal combination consists in the

agreement for such purposes, and not in their execution.

Down to the end of the 17th century there appears to be no reason to suppose that, apart from the determination in Starling's Case (1665) — a determination which was recognized by Lord Holt in 1704 (Best) as exceptional—the word "unlawful" or "illegal," as used to describe the purposes, a combination for which is an indictable offence, was ever used by the Courts in any other sense than that of "criminal," or at most "punishable." This is plainly the sense of the phrase "*defendu en la ley*," used in the Anonymous Case in 1354, which referred to the prohibition contained in 33 Edw. 1. It is also plainly the sense in which Coke uses the expressions "unlawful" and "*defendu en la ley*" ("prohibited by the law" in the translations) in the Poulterers' Case (1611), as appears both from his reference to the case in 1354 and from his recommendation of the rule for punishment of the combination without any act completed, as being a doctrine of mercy to the intending offender. So in Timberley's Case (1663), the "illegal thing" proposed was the commission of a crime of conspiracy, properly so called. So in Thorp's Case (1697) (if that can be regarded a case of conspiracy), the question made by the court was whether any act indictable in itself had been done. (Cp. as to the sense in which "unlawful purpose" and "unlawful act" were used in the older law of murder—1701. Plummer, Kel. 109: 1696. Keite, 1 Ld. Raym. 138 (correcting Coke, 3 Inst. 56, 57): 1727. Oneby, 2 Ld. Raym. 1485: Fost. P. C. 258, 259.) It is believed that the only early authority for a more extended doctrine is the expression in the Termes de la Ley, tit. Confederacy, where it is said that "confederacy est quant deux ou plusors luy mesmes confederent de faire ascune male ou damage al auter, ou de faire ascune chose illoyal." But that this passage has no authority, in so far as it goes beyond the Poulterers' Case, appears from the fact that every other expression in the title is taken directly from the Poulterers' Case. See the note at foot of p. 7, § 1, *sup.*, as to the earlier editions of the book.

See, in modern times, 1856, Hilton *v.* Eckersley, by Lord Campbell, C. J., and Sir W. Erle's Memorandum on the Law of Trades Unions: Rep. of Comm., App. p. lxxvi., for disapproval of the general expressions used in some of the cases since the 17th century. Some dicta of almost equal generality will be found in later cases; *e.g.* by Crompton, J., in 1861, Walsby *v.* Anley; but most of them will be found, as has been already stated, to have been used, as in Kenrick's Case (1843), with reference to questions of pleading, especially in cases of cheats. Nor perhaps does the law depend on the balancing of expressions of this kind.

SECTION III.

The Act of Combination.

§ 15. *The Act of Combination.*

Every crime consists of a state of intentionality—some form of intention or of carelessness—and an overt act or an omission to perform a duty. The kinds of intention, a combination for which may be criminal, have now been discussed, and it remains to consider what overt act will suffice.

In the earlier periods of the history of English law it was thought essential for conspiracy (properly so called) that the purposes of the combination should have been so far executed as that the person against whom the conspiracy was directed should have been actually indicted and put in peril. But it was held in 1354 (Anon.) in a case of combination for maintenance, that it was not essential that any suit should have been actually maintained; and in 1574 (Sydenham), in a case of conspiracy proper, that indictment would lie, although the grand jury had ignored the bill against the prosecutor; and the Poulterers' Case established or gave rise to the doctrine that the combination for any crime was punishable, although the purpose had not been commenced to be put in execution otherwise than by the act of agreement itself; and although this rule was at first occasionally doubted (*e. g.* Daniell, 1704; Spragg, 1760), it has long been established that no overt act is in general necessary in conspiracy beyond the agreement itself. This doctrine was applied to treason-felony in Mulcahy's Case (1868),

which contains a history of the growth of the rule in its application to treason.

Little is to be found in the books with respect to what conduct will amount to an act of agreement for the purposes of the law of conspiracy. It is clear that, generally speaking, there need not be any actual meeting or consultation, and that the agreement is to be inferred from acts furnishing a presumption of a common design. In Cope's Case (1719) it was ruled that an agreement between members of a cardmaker's family to procure a rival's apprentice to spoil his master's cards might be inferred from proof that each had separately given money to the apprentice in order to bribe him to spoil the cards; but stress seems to have been laid on the fact of the defendants "being all of a family and concerned in the making of cards." In Parsons' Case (1763) it was held that "there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances." In Leigh's Case (1775) it was ruled that an agreement to hiss an actor (or rather, perhaps, to raise a riot in a theatre) might be inferred from the acts done at one time and place, and that it was not necessary that the defendants should have come together for that purpose or have previously consulted together. So in a case of prison-breach (1793), it was ruled that concurrence in doing the act sufficed without previous acquaintance. So in Brisac's Case (1803), it was held that "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." In Pollman's Case (1809), it was ruled that a banker with whom money was deposited, for a criminal purpose of which he was aware, might be implicated. In Murphy's Case (1837), Coleridge, J., told the jury—

"If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you

will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is: Had they this common design, and did they purpose it by these common means? . . . . It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins in it afterwards, he is equally guilty. . . . If you are satisfied that there was concert between them, I am bound to say that, being convinced of the conspiracy, it is not necessary that you should find both M. and D. doing each particular act, as after the fact of a conspiracy is once established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design is, both in law and in common sense, to be considered as the act of both."

On the other hand, in Pywell's Case (1816), Lord Ellenborough ruled (so far as can be gathered from the report), that where one person put a fraud in course of execution, and another, who knew of his design, but who acted without any concert with or assent by the first person, aided the fraud, the two could not be convicted of conspiracy. In Barry's Case (1865) it was ruled to be not enough to affect a defendant that he knew of the fraud after it was done:—"the parties must put their heads together to do it."

For the rest, there seems to be no reason to suppose that, unless perhaps in some forms of treason, the kind of conduct necessary for making a man a party to a conspiracy differs in any respect from that which would be necessary for making a man a party to any other sort of criminal design. If he procures, counsels, commands or abets a design of felony, he is involved in the guilt of the principal felon, though in a lower degree, if the felony is not actually committed. If he procures, counsels, commands or abets a misdemeanor, he is guilty of a misdemeanor at common law. So there can be no doubt but that a person may involve himself in the guilt of a conspiracy by his mere assent to and encouragement of the design, although nothing may have been assigned or intended to be executed by him personally. If he joins a conspiracy already formed, he cannot in general be affected by what has been already done, except in so far as this may, in conjunction with

more specific proof, indicate the nature of the purpose in which he joined; though a different rule may apply in treason, and perhaps in a conspiracy in pursuance of which a felony has been committed. If he quits a conspiracy, there is no reason to suppose that he is in general affected by any act done after he has severed himself from it, except in so far as that act may have been done in execution of the design as it stood when he was a party to it.

So with respect to evidence. There is no ground to suppose that, unless in cases of treason, there are any special principles of evidence applicable to conspiracy (1820. Hunt); though the application of those principles may be affected by the fact that in ordinary crimes a participation in an *act* has to be proved, whereas in conspiracy the question is of participation in a design. What was done before he joined, or what is done or said in his absence by other parties to the design in furtherance of the common object, may, as in the case of any other joint criminal design, be evidence of the general character of the design, subject to proof to be given for affecting him with a participation in it. But acts done or admissions made by other parties after he has ceased to have any connection with the design, or for some purpose *ultra* the common design, may be evidence against them, but will not be evidence as against him, even of the general nature of the design; unless perhaps where it can be shown that the act was done in pursuance of instructions given or arrangements made while he was a party; and even so, it is rather the instruction or arrangement which affects him, than the act done in pursuance of it. The facts in issue are, whether there was an agreement for the alleged purposes, and whether the defendant was a party to it. Evidence in support of either fact may be given first, subject to the conditions laid down in the Queen's Case (1820) for preventing unfair prejudice to a defendant. If evidence

is allowed to be first given of the general matter, that is only provisionally relevant as against a particular defendant, until evidence of the second kind is given. If evidence is first given of the acts of a particular defendant, that is only provisionally relevant as against other defendants, until it is shown either from the manner in which those acts were done or otherwise, that the acts were done in pursuance of a design common to him and them.

See Rosc. Cr. Ev. by Stephen, tit. Consp.; 3 Russ. by Gr. 161, 295; 1794. Hardy; Horne Tooke; 1796. Stone; 1799. Hammond; 1803. Brisac; 1817. Watson; 1820. The Queen's Case; 1820. Hunt; 1837. Murphy; 1839. Frost; 1840. Shellard; 1844. Blake; 1848. Lacey; 1848. Brittain; 1851. Duffield. It is not proposed here to set out the illustrations furnished by the cases on conspiracy of the application to that crime of the general rules of evidence.

It may be noted that 3 Russ. by Gr., p. 166, is sometimes cited as extracting from Lord Grey's Case (1682) the proposition that "every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there be no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete." No such passage occurs in Lord Grey's Case, nor does Sir W. Russell cite it as an extract from that case, nor does that case appear to have been prosecuted as a case of conspiracy. The doctrine is no doubt generally correct, but it is true of conspiracy only as it is true of other joint crimes. See at foot of p. 106, *inf.*

It is not part of the present design to consider the subjects of pleading and of procedure in conspiracy. They will be found treated in 3 Russ. by Gr. 159 *seq.* But in general it may be said that the ordinary rules of criminal pleading apply to conspiracy, with exceptions arising from the fact that the design of the conspirators need not have been executed or completely ripened in detail, and that the details consequently not only cannot be stated in all cases, but may commonly be immaterial. Thus there may be a criminal design to defraud persons of things by means not yet completely determined; and in such a case these undetermined matters must necessarily be treated as

to the jurors unknown, or stated generally; and this necessity has given rise to more general rules, such as that in an indictment for a conspiracy to defraud by false pretences—the false pretences, even where they are known, need not be particularly set out. The averment in the indictment of the criminal purpose must show clearly that the purpose was one for which it is criminal to agree;—by general words of art, if such exist which are applicable to the case; or by details. If the averment of the purpose fails in this, but overt acts are laid in such a mode as to show matter indictable irrespectively of the combination, the averment of conspiracy may be disregarded, and the parties may be tried for the joint offence so disclosed; but an insufficient averment of criminal purpose will not be aided by averments of overt acts not shown to be criminal independently of combination (1844. King).

Questions of great difficulty may occur with respect to jurisdiction in conspiracy. In Brisac's Case (1803) it was held, that although the agreement was made at a place out of the jurisdiction of the common law courts, it was yet triable in the ordinary criminal courts in England if an overt act in execution of it was done in England; and that an act done in England by an innocent agent of one of the conspirators was the act of the conspirators for this purpose. In Bernard's Case (1858) a question occurred whether a person could be indicted in England for having counselled in England the murder of an alien in Paris. The defendant was acquitted, and the point was not determined; but in 1861 the 24 & 25 Vict. c. 100, s. 4, provided for conspiracies and other offences of this kind, not however by applying to the offenders the general clauses relating to accessories, but by a special enactment making the offence a misdemeanor. (See 1 Russ. by Gr. 760, 967.) In Kohn's Case (1864) a conspiracy was formed in England by the defendant and others for casting away a foreign ship in order to prejudice the underwriters.

The ship was scuttled when out of the jurisdiction by the defendant and others, who appear all to have been foreigners. Willes, J., is reported to have told the jury that—

"The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the question which arose in R. *v.* Bernard, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . For the principal offence . . . the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign and the offence was committed on the high seas."

(See as to Wakefield's Case, *inf.*, § 17, p. 81.)

It appears to be implied in Brisac's Case that a conspiracy by British subjects abroad to violate an English law is not at common law indictable in this country unless an overt act is committed here. It is not easy to collect the effect of Kohn's case with respect to conspiracies here for acts to be done abroad. If the contemplated act, when done, will not, by reason of the place and of the nationality of the actors, be punishable here, there would be much difficulty in holding criminal by our law an agreement here for doing that which when done would not be a crime against our laws. Again, suppose that aliens agree abroad to do or to procure to be done here an act which will be in violation of English law, it is clear that their agreement is so far no crime against our law. But suppose further that they procure an innocent agent to do an overt act here; or that one of them does an overt act here. Can each of them in the former case, or can those who remain abroad in the latter case, be said to have broken our law? It is conceived that our law of criminal participation or agency could not be applied in such a

case. But these and similar questions appear still to await judicial determination.

The punishment of conspiracies in general is now by fine and imprisonment with or without sureties, as in the case of other common law misdemeanors. By the 14 & 15 Vict. c. 100, s. 28, hard labour may be added in the case of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert or defeat the course of public justice. The misdemeanor of conspiracy to murder may, under the 24 & 25 Vict. c. 100, s. 4, be punished with penal servitude for not more than ten years, or with imprisonment for not more than two years, with or without hard labour.

The crime of conspiracy to commit a crime or offence does not merge in the crime or offence when the conspiracy is executed. (1844. O'Connell, per Lord Campbell, C.J.: 1848. Button.) Nor is the punishment limited to the punishment prescribed by law for the complete offence. (1851. Rowlands.) Nor, as it seems, does the expiration of the time limited by a statute for a prosecution for an offence against its provisions, bar a prosecution for conspiracy to commit that offence. (1851. Thompson.)

It seems never to have been considered whether the ancient exception from the law of conspiracy, properly so called, of grand jurors or other persons acting under colour of judicial office or duty (1608. Floyd *v.* Barker, &c.) applies to the modern form of the crime.

The ancient writ of conspiracy appears not to have lain against husband and wife alone. It is said to have lain against husband, wife and a third person. (See Yearb. 38 Edw. 3, 3*a*: 40 Edw. 3, 19: 41 Edw. 3, 29: Fitzh. N. B. 116 l: Staundf. 174.) But the effect of the ancient authorities is doubtful; and it may be questioned whether a husband and wife could not be convicted of conspiracy in any of its modern forms. Proof, however, of coercion by the husband would in such a case have the

effect of negativing the fact of conspiracy, since the force would avoid the agreement.

Reports of the Criminal Law Commissioners of 1834—1848.

The Criminal Law Commissioners in 1848 (Mr. Starkie, Mr. Kerr, Mr. Amos, 4th Rep. p. 205) reported the following articles as a consolidation of the law of conspiracy :—

"2. The crime of conspiracy consists in an agreement by two persons (not being husband and wife), or more than two persons, to commit any offence, or to defraud or injure the public or any individual person.

"3. It is immaterial to the crime of conspiracy whether the causing such fraud or injury be the ultimate object of such agreement, or be merely incidental to that object or to the means of effecting it.

"4. Every agreement to defraud or injure the public in respect of any property, or to endanger the public safety or peace, or to annoy or disturb the public in the enjoyment of any civil right, or to subvert or deprave religion or morals, or to prevent, pervert or obstruct the administration of justice or any other branch of executive authority, or to hinder or obstruct the due operation of any law for the regulation of marriage, the maintenance of the poor, or any other law for the regulation of the state or condition of society, or to occasion any other public injury or nuisance, or which directly tends to produce any such injury or nuisance, is an agreement within article 2.

"5. Every agreement with intent to injure or prejudice any other in his person, reputation, office, profession, occupation, state, or condition in society, or to injure or disturb him in the possession or exercise of any civil right, or to defraud or injure him in respect of his property, is within the meaning of article 2.

"6. It is not essential to the crime of conspiracy, as regards any fraud upon or injury to the public, that the agreement should be injurious or hurtful to the public in its aggregate capacity or all her Majesty's subjects ; it is sufficient if it be injurious or hurtful to a class or portion only of those subjects.

"7. Whosoever shall commit the crime of conspiracy, shall in case he shall conspire to commit a felony, or to defraud or injure or annoy the public, incur the penalties of the 11th class" (imprisonment up to three years, with or without fine) ; "and shall, in respect of any other conspiracy, incur the penalties of the 12th class" (imprisonment up to two years, with or without fine).

These articles are reported without citation of authority and without discussion, except some observations on a case of combination to defraud (1816. Pywell). Substantially similar articles were in like manner reported by former commissioners (Mr. Starkie and Mr. Kerr) in 1843 (7th Rep. p. 89), without authorities or discussion, except some observations on the cases of Turner (1811), and Pywell (1816). It is conceived that the articles contain generalizations from exceptional cases, and some propositions for which no statutory or judicial authority appears to exist.

See further 4th Rep. 1848, pp. 81, 91, 112, for articles relating to seditious conspiracy, to combinations prohibited by the acts of Geo. 3, and to conspiracies falsely to charge with crime.

§ 16. *Foreign Laws.*

No general title corresponding to that of conspiracy in English law appears in either of the Penal Codes of France, Belgium, North Germany, Bavaria, Austria, Holland, Italy or British India. They contain various general provisions concerning abettors, accomplices and participators in crimes, and special provisions for punishing agreements of a treasonable character, riotous assemblies, and secret associations. The French Code and the codes derived from it further specially punish combinations by officials for abuse of their official position, and combinations to disturb prices by fraudulent means, or to engross merchandise, and all the above-mentioned codes except those of North Germany and India, contain some special provisions against coalitions by employers and workmen. The former provisions of the French Code with respect to these coalitions were very comprehensive, but they were modified in 1864 by a law which "consecrating [says Sirey] the system of absolute liberty of coalition whether between employers or between workmen, and confining itself to the repression of violence and fraud" repealed the then existing provisions of the code, and substituted the following provisions—(Codes. Roger et Sorel. 1873):—

"414. Sera puni d'un emprisonnement de six jours à trois ans et d'une amende de 16 francs à 3,000 francs, ou de l'une de ces deux peines seulement, quiconque, à l'aide de violences, voies de fait, menaces ou manœuvres frauduleuses, aura amené ou maintenu, tenté d'amener ou de maintenir, une cessation concertée de travail, dans le but de forcer la hausse, ou la baisse des salaires, ou de porter atteinte au libre exercice de l'industrie ou du travail.

"415. Lorsque les faits punis par l'article précédent auront été commis par suite d'un plan concerté, les coupables pourront être mis, par l'arrêt ou le jugement, sous la surveillance de la haute police pendant deux ans au moins et cinq ans au plus.

"416. Seront punis d'un emprisonnement de six jours à trois mois et d'une amende de 16 francs à 300 francs, ou de l'une de ces deux peines seulement, tous ouvriers, patrons et entrepreneurs d'ouvrage qui, à l'aide d'amendes, défenses, proscriptions, interdictions prononcés par suite d'un plan concerté, auront porté atteinte au libre exercice de l'industrie ou du travail."

The Italian Penal Code (385—388), includes concert

by employers to compel their workmen to accept payment in kind, and makes the absence of "reasonable cause" or "just motive" the test of the criminality of combinations to strike or to prevent work or to raise wages. Feuerbach's original Bavarian Code punished such combinations when the workmen of more than one master engaged in them, but by the later forms of that code, combinations, whether of employers or of workmen, appear to be punishable only when their purpose is to resist or obstruct the enforcement of public regulations relating to works. (Art. 141.) All the continental codes and the Indian Code (503), contain comprehensive provisions of general application against intimidation and insult. (See, for a discussion by Belgian jurists of the principles on which legislation against combinations by workmen ought to be based, the Report of the Commission for the revision of the Belgian Penal Code, Book II. Tits. 5, 6; Brussels, 1861, pp. 32—42.)

Livingston's draft Penal Code (1828, p. 140), proposed to punish as conspiracies—(i) conspiracy to commit an offence; (ii) conspiracy "falsely to accuse and prosecute another of committing an offence;" (iii) agreements not to buy labour or goods at more, or not to sell labour or goods at less, than an agreed price, or to enhance the price of victuals, or maliciously "to injure any individual or description of persons in their reputation or profession or trade or property, by agreeing not to employ them, or by other means that would not otherwise amount to an offence." An exception from the third head is proposed in the case of partners, unless the partnership is "specially entered into for the purpose of making such conspiracy."

The draft Penal Code for the State of New York (1865), proposes the following provisions:—

Criminal Conspiracies defined.

§ 224. If two or more persons conspire, either:

1. To commit any crime; or,
2. Falsely and maliciously to indict another for any crime; or to procure another to be charged or arrested for any crime; or,

3. Falsely to move or maintain any suit, action or proceeding; or,
4. To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences; or,
5. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws,

they are guilty of a misdemeanor.

Conspiracy against the Peace of the State.

§ 225. If two or more persons, being out of this state, conspire to commit any act against the peace of this state, the commission or attempted commission of which, within this state, would be treason against the state, they are punishable by imprisonment in a state prison not exceeding ten years.

Overt Act when necessary.

§ 226. No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

§ 673-4. (Conspiracy to commit frauds in the sale of passage tickets.)

These clauses, except § 225, are founded on the Revised Statutes of the State of New York.

By the common law, as it is interpreted in Canada, according to a recent Canadian work (Clarke's C. L. 1872, p. 401), "A conspiracy is an agreement by two persons, or more, to do, or cause to be done, an act prohibited by penal law, or to prevent the doing of an act ordained under legal sanction by any means whatever; or to do, or cause to be done, an act, whether lawful or not, by means prohibited by penal law." (Cites R. *v.* Roy, 11 L. C. J. 93, per Drummond, J.)

In the Scotch common law conspiracy appears to be a general criminal title, but in practice to hold a less prominent place than it holds in English law. Prosecutions seem to have been instituted in Scotland against workmen for combination between 1790 and 1800, but in 1808 a majority of the judges held that a combination to raise wages was not punishable at common law. The history

of the cases which followed, and which seem to have established firstly that combinations to coerce employers or workmen were punishable when accompanied with violence, and ultimately that they were punishable even in the absence of violence, will be found in the fifth Report of the Select Committee (H. C.) of 1824, on Artizans and Machinery, p. 489. These decisions were based not on any supposed ancient precedents or rules of law, but on the principle that the common law of Scotland is expansive.

"This new point of dittay [Baron Hume says in a passage quoted *ubi sup.*] seems therefore now to be thoroughly established, and it furnishes another illustration of the character of our common law, and of its power to chastise, of its own native vigour, all wrongs and disorders as the state of society brings them forth, which are found to be materially dangerous to the public welfare."

§ 17. *Conclusions.*

The question remains, what is the proper place or use in the criminal law of the mere mental act or state of agreement or concurrence;—an act or state which in itself is plainly neutral and conveys no associated idea of praise or blame. In the attempt to answer this question the first step is to distinguish between—(i) agreements for the commission of crimes, (ii) agreements for minor offences, and (iii) agreements for acts which in the absence of agreement would not be crimes or offences.

(i). *Agreements for the commission of Crimes.*—A law which directs the prosecution or punishment in a particular manner of an agreement for a crime is merely auxiliary to the law which creates the crime. The aid which it brings may be of either or all of four kinds. Firstly, the agreement may serve as a substitute for an actual attempt or commission, the mere act of agreement for execution of a criminal design being treated not merely as a sufficient evidence of the design but also as an "overt"

act or act in furtherance of the design. For this purpose the use of such a law is not altogether so great as at first sight it may appear to be, for it is seldom that direct proof occurs of an actual agreement by words or signs, and the agreement is commonly inferred from apparent concurrence in acts which might of themselves be made to serve the same purpose. Still in many cases the fact of the concurrence of several persons in acts apparently tending to a particular result assists the conclusion that the accomplishment of the result was intended by them, and lessens the probability of chance or of ignorance or mistake in any of the persons. Moreover, it is hardly possible to frame a completely satisfactory definition of an attempt, and the concurrence of one person with others in acts done in apparent furtherance of a criminal design may not improperly take the place of an approximation to completion of the design as an evidence that the person had fully adopted the design and committed himself to its complete execution. Secondly, the attachment of criminality to the agreement may be useful in founding jurisdiction. Thus in Wakefield's Case (1827) the design was to carry away an heiress under age from England and to marry her in Scotland to one of the defendants. By the construction put by the judges on the statute on which the crime of abduction then depended, it was of the essence of the crime that the purposes of the abduction should have been consummated, and as that event was not to happen in England, the commencement of the abduction in England did not amount to an attempt to commit a crime in England. But here the law of conspiracy came in aid of the law of attempts, and gave jurisdiction to the English courts by attaching criminality to the agreement as evidenced by acts done in England in furtherance of the design, although those acts did not amount to an attempt to commit a crime in England. Thirdly, there may be cases in which the agreement or concurrence of several persons in the execution of a criminal design is a proper ground for aggrava-

tion of their punishment beyond what would be proper in the case of a sole defendant. Such would be cases in which the co-operation of several persons at different places is likely to facilitate the execution or the concealment of a crime, or in which the presence of several persons together is intended to increase the means of force or to create terror, or cases of fraud in which suspicion and ordinary caution are likely to be disarmed by the increased credibility of a representation made by several persons. Some instances of the application of this principle are to be found in the English law, as in the Night Poaching Act. In some foreign codes it is applied less sparingly; and it might probably receive with advantage a still more general application. Lastly, a law which attaches criminality to the mere agreement for a crime may be useful as a ground for admission of evidence which might not be relevant to an issue confined to the actual attempt or commission. The English law of conspiracy to commit crimes attains the first two and the last of these objects; but it is defective in that it has no sufficient means of proportioning the punishment to the gravity of the criminal design. Conspiracies to murder are now punishable with penal servitude for ten years (but still only as misdemeanors). Conspiracies for cheats, extortion, false accusation, or perversion of justice, may be punished with hard labour during such term of imprisonment as may be awarded at common law. But, with these exceptions, conspiracies of the most aggravated kinds seem to be punishable only by simple imprisonment, fine and requirement of surety, as in the case of any misdemeanor at common law. This defect might perhaps be simply cured by extending the law of abetment in cases of combination to abetments which are not followed by an actual attempt or complete crime. Such a provision would of itself supply the basis of a graduated scale of punishment, by attracting the punishments already provided for the completed crimes. A limitation of the maximum of punishment, in cases where the crime is not

completed, to a proportion or part of the punishment provided for the completed crime, and a provision for increased punishment in certain cases (as above suggested) when the crime is completed, or when an actual attempt is committed by persons acting in combination, would complete a system the principles of which have already been adopted in the Indian and in several Continental penal codes.

(ii.) *Agreements for minor Offences.*—So far the question has been of agreements for crimes. It is next to be considered in what manner agreements ought to be treated when they are for offences punishable only on summary prosecution and by minor penalties. There is great difficulty in discovering the principles which are here applicable; but the difficulty will be diminished by dismissing at the outset all offences which ought in a good penal system to be treated as crimes, but which happen to be treated only as minor offences in any particular penal system. These being eliminated, the remaining offences consist in the production of results which, *ex hypothesi*, are not in themselves of grave enough consequence to be matters for indictment; and, if so, it must in general be immaterial whether the results are produced by one person or by two or more persons. To permit two persons to be indicted for a conspiracy to make a slide in the street of a town, or to catch hedge-sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve. On the other hand, there may be cases in which the concurrence of several persons for committing an offence may essentially change its character, and so enhance its mischief that the joint act may properly be treated as a crime. It would seem to be inexpedient to leave it to the choice of the prosecutor, after the act has been done, to determine to which of the two classes the act is to be referred in a particular case, for this would in effect apply a penalty

greater than could have been anticipated by the offenders in that case, and yet would not convey that certain intimation of penal consequences to future offenders, without which a punishment fails to deter. What then is the test? It is conceived that no general test can be found; but that whoever undertakes the task of criminal legislation ought to consider the different kinds of minor offences separately, and to specify in the written law the kinds in which the guilt is liable to be treated as enhanced by combination. Exhaustive lists of minor offences are furnished not only by foreign codes, but by the English statutes, and it would not be dificult to reduce to a small number the cases in which there may be ground for such treatment. This task cannot here be attempted, but instances may be suggested. Firstly, the offence of rattening, as it is defined by the 34 & 35 Vict. c. 32 ("if he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof," with a view to coerce him to quit or refuse work, or to belong or not to belong to a union, &c.), seems to be such an instance. Threats of the kinds and used with the intents mentioned in the same statute, seem to be another instance. These are offences which, irrespectively of the agreement, are on the verge of criminal force, and they derive greatly increased effectiveness from the concurrence of several persons. A case of great difficulty is that of combined breach of contract, of a kind for the breach of which an individual may be punished. Much may be said both for and against attaching a criminal sanction to contracts in certain cases (*a*). But even where it is thought necessary to visit

(*a*) For instance, if a criminal penalty is attached to the breach of a time contract, workmen may be likely to abstain from entering into contracts which may subject them to criminal jurisdiction; and, in so far as they are induced so to abstain, the law would operate to discourage the undertaking of continuous service, and to prevent the establishment of permanent and organized relations and community of interest between the employer and the employed. On the other hand, there may be some exceptional trades, the sudden interruption of which might be of so mischievous consequence to the public, that workmen who chose to engage in them might properly be required to engage for a fixed term, and be punished for leaving work before the end of the term.

breaches of contract with summary penalties, it does not follow that it must be expedient to proceed by indictment for the concerted breach. The concert may commonly be a mere simultaneity arising from the fact that one real or supposed grievance happens to press at the same time on many persons; and in such a case an interchange of complaints is inevitable, and does not of itself involve anything which it can be desirable to punish. Still, so long as the law continues in any case to consider a breach of contract as a fit subject for punishment, it cannot be said that there may not be instances in which a concert to break, or even to counsel the concerted breach of such contracts may be properly visited with a punishment greater than that which is inflicted on a sole offender; for not only may the mischief be greater, but in proportion to the superior efficacy of a concerted breach of contract is the temptation to use it for attaining the objects, whatever they may be, for which contracts are broken. But on the whole it is conceived that there can be very few kinds of minor offences, the quality of which can be so altered by agreement as to make it necessary to punish them by indictment; and that those kinds ought to be considered beforehand by the legislature and specified in the written law.

(iii.) *Agreements for Acts which in the absence of Agreement would not be Crimes or Offences.*—It remains to be considered in what cases acts which are not punishable in one person may properly be treated as crimes when they are done by several persons acting in agreement. Two classes of cases, which rest on peculiar grounds, must first be distinguished. One of these peculiar classes comprises acts which are necessarily collective and which cannot for physical reasons be committed by one person. Such are the crimes of unlawful assembly or association, and of a fraudulent knock-out at an auction, and the crime, which is punished by the French Code, of concert by officials for improper purposes which cannot be accom-

plished without the co-operation of different departments. The other peculiar class comprises acts, such as certain frauds or perversions of justice, which ought to be punishable independently of agreement. If a particular penal system is so imperfect as not to punish some acts of this kind, irrespectively of agreement, it may be well that its deficiencies should be partially supplemented by a power to punish the concerted acts; but the ground on which their punishment is to be justified is not the agreement, but its purposes.

Apart from cases falling within one or other of these two classes, there appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement; for if the act is one which can be done by a person acting alone, and when so done ought not to be punished, it is difficult to see at what point and on what ground criminality can be generally introduced by the fact that two or more persons concur in the act. No such rule seems to have been admitted by the framers of the Indian Code in any case or by the framers of the continental codes which have been examined, except in some cases of agreements by traders, employers or workmen. Nor does it seem possible to frame such a rule, at all general in its scope, which would not include large classes of acts that could not properly be made criminal. With respect to agreements, other than agreements for damage to the interests of individuals, no general test has been suggested. With respect to agreements for damage to the interests of individuals, the only tests which have been suggested are those of civil injury and of "malice." But it could not be seriously proposed to make agreement in doing a civil injury generally criminal; and it has long been recognized that the only general meaning which can be attached to "malice," for legal purposes, is that of intention to produce a result, and to do so without or not in pursuance of an excuse or just cause: and the legal

value of malice depends on the nature of the result which is intended to be produced, and not on the malice itself, which is merely a condition of guilt in certain cases. If two persons agree to walk in a park without leave, or to break a contract which they could perform, their mental state displays every element of malice in the only distinct legal sense in which that term can be used.

On the other hand, it cannot be doubted but that there may be exceptional cases in which acts, unnecessary to be punished when done by persons acting individually, may become proper objects of penal law when they are done by several or many persons. Such, in the laws of several countries, are certain kinds of combined conduct by traders, employers, or workmen in respect of the prices of goods or labour. Into the policy of penal legislation on these questions it is not proposed to enter. But it is to be observed that, even in these cases, the tendency of modern legislative change has been to abandon the general forms of enactment and to substitute provisions containing definite criteria of criminality, such as the use of violence or of threats of violence. Nor can it be doubted but that this course ought to be followed in all cases, at least so far as to make clear before hand, both to the legislature and to those whom the law will affect, what it is that is forbidden (*b*).

On the whole it seems that the uses in criminal law of

(*b*) For instance, there may be much to be said for punishing workmen who should agree to tell an employer in a dictatory manner that he must discharge an obnoxious person or that they will strike on the termination of their existing engagements. But it appears to be now lawful for workmen to agree among themselves not to return to work where an obnoxious person continues to be employed; and a law which should prohibit them from informing the employer of their resolution would leave them no course but that of striking without reason given, as a means of suggesting to the employer that there is a grievance about which he will do well to inquire. Such a law would be more likely to embitter differences than to benefit the public or either of the parties. Then if the dictation in fact by simultaneous cessation of labour is lawful, and if the dictation in words by a civil intimation of the object is lawful, can they be properly made criminal by reason of a bad or offensive manner, which possibly formed no part of the design ?

the doctrine of the criminality of agreement are of the following kinds and subject to the following limitations, viz:—

1. Its principal function is that of a general auxiliary to laws creating particular crimes. Four modes have been specified in which it may be so auxiliary.

2. In some cases it may be proper to treat the agreement for a minor offence as so altering its quality and mischief as to make it a fit object for punishment as a crime. But these cases are probably few, and they ought to be specified in the written law.

3. There are some mischievous conditions of things, such as an unlawful assembly, which ought to be punished as crimes, and which cannot be brought about except by the concurrence of more persons than one.

4. There may be cases in which acts done by several persons in agreement ought to be punished, although the same acts ought not to be punished if done without agreement. But these ought to be specified and carefully defined (*c*).

5. In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which are not, but which ought to be made punishable irrespectively of agreement, and especially for some kinds of fraud; but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such power ought to be carefully guarded, since the legislature admits its own inability to discover the principles on which legislation ought to proceed.

(*c*) Perhaps the most difficult case will be found to be that of sedition. It seems to be a question rather of policy than of jurisprudence what conduct should be punishable on this ground, and some vagueness may here be a necessary condition of efficiency. Still propositions so general as some which occur or are involved in O'Connell's Case (1844, *inf.* App. II.) could hardly be embodied in a written law.

APPENDICES.

APPENDIX I.

LIST OF STATUTES

Now in force relating to Conspiracies and Criminal Combinations (except for Treason, Treason-Felony or Riot).

A.D.		
1292	20 Edw. 1	Statutum de Conspiratoribus.
1300	28 Edw. 1, c. 10 ..	Artic. *sup.* Cart.
1305	33 Edw. 1	Ordinatio de Conspiratoribus.
1330	4 Edw. 3, c. 11	Commission of Oyer and Terminer to enforce the three former ordinances.
1797	37 Geo. 3, c. 123 ..	Unlawful Societies.
1799	39 Geo. 3, c. 79 ..	Unlawful Societies.
1817	57 Geo. 3. c. 19 ..	Unlawful Societies.
1842	5 & 6 Vict. c. 38 ..	Jurisdiction of Quarter Sessions.
1844	7 & 8 Vict. c. 24 ..	Forestalling, &c.
1846	9 & 10 Vict, c. 33 ..	Proceedings for Penalties under the Acts of 1799 and 1817 must be commenced in the name of a Law Officer.
1851	14 & 15 Vict. c. 100, s. 29	Hard Labour may be inflicted for certain Conspiracies.
1859	22 & 23 Vict. c. 17 ..	Vexatious Indictments Act.
1861	24 & 25 Vict. c. 100, s. 4	Conspiracy to Murder.
1867	30 & 31 Vict. c. 35 ..	Amends the Vexatious Indictments Act.

APPENDIX II.

LEADING CASES.

Anon. 1351. 24 Edw. 3, p. 75 (99).

The son of W. de J. sued in K. B. by leave of the king, to reverse a judgment given against him on circuit at Derby on a presentment of conspiracy; and he assigned as error that the presentment showed neither day, year, nor place; and also that the matter alleged, which was imprisonment of a man until he should pay a fine, sounded rather in the nature of oppression of the people than in conspiracy.

It was answered that he had been arraigned and pleaded not guilty, and so had waived the irregularity; and also, that since his father, who had been indicted with the complainant as his only co-conspirator, was dead, a reversal of the judgment against the complainant would leave a judgment on record against the father, which the reversal in the complainant's case would show to have been erroneous; and so there would be inconsistent records.

But the court held that the court in eyre ought not to have required the complainant to surrender on such a presentment, from which it could not be gathered whence the visne were to come; and they said, "It will be a "strong thing if the death of his neighbour or his companion shall bar his "remedy. And because neither year, nor day, nor place was averred, and "in conspiracy it shall be said that they at such a place, &c.; and moreover "because the principal matter of the conspiracy alleged is not conspiracy, "but rather damage and oppression of the people. Wherefore we reverse "and annul the judgment."

Anon. 1354. 27 Ass. p. 138 *b*, pl. 44.

Note that two were indicted of confederacy, each to maintain the other, whether his cause should be true or false, and notwithstanding that nothing was suggested to have been put in ure, the parties were put to answer, because this thing is forbidden by the law (*defendu en la ley*). (See the Act, 33 Edw. 1, &c.)

1611. *The Poulterers' Case*, 9 Rep. 55; Moore, 814.

Mich. 8 Jac. Regis. (In the Star Chamber. See Moore, 814; 1 Bulst. 150.) "The case between Stone, plaintiff, and Ralph Waters, Henry Bate,

J. Woodbridge and many others, Poulterers of London, defendants, for a combination, confederacy, and agreement betwixt them falsely and maliciously to charge the plaintiff (who had married the widow of a poulterer in Gracechurch Street) with the robbery of the said Ralph Waters, supposed to be committed in the county of Essex, and to procure him to be indicted, arraigned, adjudged and hanged, and in execution of this false conspiracy, they procured divers warrants of justices of peace by force whereof Stone was apprehended, examined and bound to appear at the assizes in Essex; at which assizes the defendants did appear, and preferred a bill of indictment of robbery against the said plaintiff; and the justices of assize hearing the evidence to the grand jury openly in court, they perceived great malice in the defendants in the prosecution of the cause, and upon the whole matter it appeared, that the plaintiff the whole day that Waters was robbed was in London, so that it was impossible that he committed the robbery, and thereupon the grand inquest found—*Ignoramus*. And it was moved and strongly urged by the defendants' counsel, that admitting this combination, confederacy and agreement between them to indict the plaintiff to be false and malicious, that yet no action lies for it in this court or elsewhere, for divers reasons,—1. Because no writ of *conspiracy* for the party grieved, or indictment or other suit for the king lies, but where the party grieved is indicted, and *legitimo modo acquietatus*, as the books are [F. N. B. 114, &c.]. 2. Every one who knows himself guilty may, to cover their offences and to terrify or discourage those who would prosecute the cause against them, surmise a confederacy, combination, or agreement betwixt them, and by such means notorious offenders will escape unpunished, or, at the least, justice will be in danger of being perverted, and great offences smothered, and therefore they said, that there was no precedent or warrant in law to maintain such a bill as this is. But upon good consideration it was resolved that the bill was maintainable; and in this case divers points were resolved. * * *

And it is true, that a writ of *conspiracy* lies not unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books; and therefore in 27 Ass. p. 44, in the Articles of the charge of Enquiry by the Enquest in the King's Bench, there is a *Nota*, that two were indicted of confederacy, each of them to maintain the other, whether their matter be true or false, and notwithstanding that nothing was supposed to be put in execution, the parties were forced to answer to it, because the thing is forbidden by the law, which are the very words of the book; which proves that such false confederacy is forbidden by the law, although it was not put in use or executed. So there in the next articles in the same book, inquiry shall be of conspirators and confederates, who agree amongst themselves, &c. falsely, to indict, or acquit, &c. the manner of agreement and betwixt whom; which proves also, that confederacy to indict or acquit, although nothing is executed, is punishable by law: and there is another article concerning conspiracy betwixt merchants (*a*), and in these cases the conspiracy or confederacy is punishable although the conspiracy or confederacy be not executed; and it is held in 19 R. 2, Brief 926, a man shall have a writ of conspiracy, although they do nothing but conspire together, and he shall recover damages, and they may be also indicted thereof. Also the usual commission of *oyer* and *terminer* gives power to the commissioners to enquire, &c. *de omnibus coadunationibus, confœderationibus, et falsis alligantiis;* and *coadunatio* is a uniting of themselves together, *confœderatio* is a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful

(*a*) This was on the statute 27 Edw. 3, st. 2, c. 3, and followed its words.

act. In these cases before the unlawful act executed the law punishes the coadunation, confederacy or false alliance, to the end to prevent the unlawful act, *quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud: et affectus punitur licet non sequatur effectus;* and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. * * * And afterwards upon the hearing of the case, and upon pregnant proofs, the defendants were sentenced for the said false conspiracy by fine and imprisonment. *Nota* reader, these confederacies, punishable by law, before they are executed, ought to have four incidents:—1. It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or promises one to the other. 2. It ought to be malicious, as for unjust revenge, &c. 3. It ought to be false against an innocent. 4. It ought to be out of court voluntarily." (See the Act of 1305, 33 Edw. 1).

1665. *Starling*, 1 Sid. 174; 1 Keb. 650, 655.

Information against brewers of London for confederating and conspiring to put down the gallon trade by which the poor are supplied, and to cause the poor to mutiny against the farmers of excise; and also for that whereas the excise was settled on the king by statute as part of his revenue the defendants confederated and conspired to depauperate the farmers of the excise. The jury found them guilty on the second count only. It was moved to quash the information on the ground that it is no crime by our law to depauperate another in order to enrich oneself, as by underselling. But after several debates, the K. B. (Hyde, C. J., *et al.*) gave judgment for the king, for that the information recited that the excise was parcel of the king's revenue, and to impoverish the farmers would be to make them incapable of rendering the king his revenue; and although there could not be conspiracy without some overt act of several, still they all agreed that the conspiracy here is an act punishable. (It seems to have been supposed by counsel in Thorp's Case, 5 Mod. at 224, that the conspiracy was to brew nothing but small beer.) The Court also held that conspiracy and confederacy need not be laid to be *vi et armis;* and they said there were many informations in the Exchequer for conspiracy to lessen the king's revenue without the *vi et armis*.

1811. *Turner*, 13 East, 228.

Conspiracy to trespass on A.'s preserve by night with offensive weapons and to snare hares there. The K. B. (Lord Ellenborough, C. J., Le Blanc, Bayley and Grose, JJ.) arrested the judgment.

Lord Ellenborough, C. J.—"All the cases in conspiracy proceed upon "the ground that the object of the combination is to be effected by some "falsity; insomuch that in Tailor and Towlin's Case, in Godb. 444, it was "held necessary in conspiracy to allege the matter to be *falso et malitiose*. "By the old law indeed the offence was considered to consist in imposing "by combination a false crime upon a person. But are you prepared to "show that two unqualified persons going out together by agreement to "sport is a public offence?

"Spragg's Case was a conspiracy to indict another of a capital crime; "which no doubt is an offence. And the case of The King *v.* Eccles and "others was considered as a conspiracy in restraint of trade, and so far a "conspiracy to do an unlawful act affecting the public. But I should be "sorry that the cases in conspiracy against individuals, which have gone "far enough, should be pushed still farther: I should be sorry to have it "doubted whether persons agreeing to go and sport upon another's ground, "in other words, to commit a civil trespass, should be thereby in peril of "an indictment for an offence which would subject them to infamous "punishment." (See in text, Sect. II. § 11.)

1814. *De Berenger*, 3 M. & S. 67.

Indictment for that the defendants contriving by false reports to induce the subjects to believe that peace would soon be made with France, and thereby to occasion a rise of the funds and injure the subjects who should buy funds on February 21, conspired to spread a false report of Napoleon's death, &c.

Lord Ellenborough, C. J.—"A public mischief is stated as the object of "this conspiracy; the conspiracy is by false rumours to raise the price of "the public funds and securities; and the crime lies in the act of con- "spiracy and combination to effect that purpose, and would have been "complete although it had not been pursued to its consequences, or the "parties had not been able to carry it into effect. The purpose itself is "mischievous, it strikes at the price of a vendible commodity in the market, "and if it gives it a fictitious price, by means of false rumours, it is a fraud "levelled against all the public, for it is against all such as may possibly "have anything to do with the funds on that particular day. It seems to "me also not to be necessary to specify the persons, who became purchasers "of stock, as the persons to be affected by the conspiracy, for the defend- "ants could not, except by a spirit of prophecy, divine who would be the "purchasers on a subsequent day."

Le Blanc, J.—"The charge in the indictment is that the defendants "conspired by false rumours to raise the price of the funds on a particular "day. It may be admitted therefore that the raising or lowering the price "of the public funds is not *per se* a crime. A man may have occasion to "sell out a large sum, which may have the effect of depressing the price "of stocks, or may buy in a large sum, and thereby raise the price on a "particular day, and yet he will be guilty of no offence. But if a number "of persons conspire by false rumours to raise the funds on a particular "day, that is an offence; and the offence is, not in raising the funds "simply, but in conspiring by false rumours to raise them on that particular "day.

"In the same manner it is if a false rumour be spread on a day prior to "a market day, in order to raise the price of a commodity in the market, "whether it be an article of necessity or not."

Bayley, J.—"To raise the public funds may be an innocent act, but to "conspire to raise them by illegal means, and with a criminal view, is an "offence; an offence, perhaps not affecting the public in an equal degree, "as if it were done with intent to affect the purchases of the commissioners "for the redemption of the national debt, which would be affecting the "public in its aggregate capacity; but still, if it be completed it will cer- "tainly prejudice a large portion of the king's subjects who have occasion "to purchase on that day. And it is not necessary to constitute this an "offence that it should be prejudicial to the public in its aggregate capacity, "or to all the king's subjects, but it is enough if it be prejudicial to a class "of the subjects. Here then is a conspiracy to effect an illegal end, and "not only so, but to effect it by illegal means, because to raise the funds "by false rumours, is by illegal means. And the end is illegal, for it is to "create a temporary rise in the funds without any foundation, the necessary "consequence of which must be to prejudice all those who become pur- "chasers during the period of that fluctuation. The next objection is, "that the indictment does not state the persons by name whom the de- "fendants intended to defraud, and it is suggested that the indictment "would have been good if it had stated that the conspiracy was with intent "to prejudice certain persons by name, and that by means thereof those "persons were prejudiced. But the conspiracy is the thing which consti- "tutes the crime, and it is sufficient if the indictment state the conspiracy "as it existed at the time when the crime was complete. It might have "been detected before any purchases were made or the mischief was effected,

" yet that would not have altered the offence, because the parties had done " everything in their power, and all that was essential to complete the " crime, when they had formed the conspiracy, and used illegal means for " effecting it. It did not depend on them but on others whether their con- " spiracy would be mischievous to others, but their criminality must depend " on their own act, and not on the consequences that ensued from it."

Dampier, J.—" I own I cannot raise a doubt but that this is a complete " crime of conspiracy according to any definition of it. The means used " are wrong, they were false rumours; the object is wrong, it was to give " a false value to a commodity in the public market, which was injurious " to those who had to purchase."

1834. *Seward*, 1 A. & E. 706.

First count, that S. was a male pauper, settled in St. Ives; that B. was a female pauper settled in and chargeable to the parish of Chatteris; that the defendants, conspiring to exonerate Chatteris and to charge St. Ives with B.'s maintenance, procured S. to marry B. and promised him money for so doing. The third count alleged a meeting for the purposes of the conspiracy and a subsequent removal of the woman to St. Ives, after her marriage, by virtue of an order of justices. The fourth count referred to the fact that the woman was with child and to the expenses of her lying-in. The fifth count alleged an unlawful conspiracy to procure the marriage for the purposes above-mentioned, stating the promise and payment of the bribe to the man. Judgment was arrested. Taunton, J., " It is not the " combining to do *any* wrongful act that constitutes a conspiracy:—R. *v.* " Turner."

Lord Denman, C. J.—" I am of opinion that this rule must be absolute. " An indictment for conspiracy ought to show, either that it was for an " unlawful purpose, or to effect a lawful purpose by unlawful means: that " is not done here. To say that meeting together and combining to ex- " onerate one parish from the burthen of a poor person, and throw it on " another, amounts to an indictable conspiracy, is extravagant. If such a " proposition could be maintained, it would apply to parishioners hiring " out a poor boy from their own parish into another. Then, when it is " said that such a proceeding is a conspiracy, because it is to be carried " into effect by unlawful means, we must see in the means stated something " which amounts to an offence. In Rex *v.* Fowler, money was given to " procure the marriage; but Buller, J., directed an acquittal, no force or " contrivance appearing. As to Regina *v.* Best, it was properly held there, " that the conspiracy was indictable, though nothing had been done in pur- " suance of it, because the object was falsely to charge a person with being " the father of a bastard child. From the nature of the fact, there could " be no doubt that the conspiracy in itself was unlawful. In Rex *v.* Spragg, " the indictment only charged a conspiracy to indict a person for a crime, " not saying 'falsely to indict;' and this was objected to as insufficient; " but it being afterwards alleged that the defendants, *according to the* " *conspiracy*, did falsely indict the party, Lord Mansfield said that 'this " was a complete-formed conspiracy, actually carried into execution:' the " averment of the execution, there, reflected back upon the statement of " the conspiracy. That case is not like the present."

Littledale, J.—" The mere procuring of that marriage was a legal act in " itself, and the indictment does not state that such procuring was effected " by any unlawful means or devices, or false pretences. If it had been " alleged to have been done with a sinister purpose and by unlawful means, " that statement would have been sufficient. The substance of this charge " is, that the defendants conspired to burthen the parish of St. Ives with a " pauper (for the merely exonerating themselves could be no offence); but, " because the natural consequence of the marriage of these parties was to

" subject the husband's parish to a burthen, it does not follow that those " who procured the marriage were indictable."

Taunton, J.—" I am of the same opinion. Merely persuading an un- " married man and woman in poor circumstances to contract matrimony, " is not an offence. If, indeed, it were done by unfair and undue means, it " might be unlawful; but that is not stated. There is no averment that " the parties were unwilling, or that the marriage was brought about by " any fraud, stratagem or concealment, or by duress or threat. No unlawful " means are stated, and the thing in itself is not an offence: to call this a " conspiracy, is giving a colour to the case which the facts do not admit " of. As stated, it is nothing more than the case where the officers of a " parish agree, after consultation, to apprentice out children from their own " parish into another: no doubt, when that is done, the one parish may be " exonerated and the other subjected to a charge; but no offence is com- " mitted."

Williams, J.—" I have always understood, that an indictment was suf- " ficient if it alleged what amounted to a conspiracy in law, though no overt " act were stated, or none stated perfectly: and in this case, I have had " some doubt whether the fourth count was not sufficient; but, on con- " sideration, I can hardly think that, in that count, if the overt acts are " rejected, and the conspiracy alone relied upon, enough appears to make " out an indictable offence. Among other things, the fact of the woman " having been a burthen to Chatteris at the time in question, is not clearly " averred: the terms used are not such that we can, judicially, take her to " have been actually chargeable to that parish when the alleged offence " was committed. Furthermore, I doubt whether the allegation of con- " spiracy in that count is to be understood in the sense in which the counsel " for the prosecution have put it to us. It is stated, that the defendants " unlawfully conspiring to exonerate the inhabitants of Chatteris from the " expense which might ensue to them from S. M. Brittan, as a poor person, " being an unmarried woman with child, and then having a legal settlement " in Chatteris, and to aggrieve the inhabitants of St. Ives, and wrongfully to " burthen them with the maintenance of the said S. M. B., and with the " charges of her lying-in, unlawfully did combine, conspire, and meet to- " gether for the purpose last aforesaid; and, being so met, did unlawfully " cause and procure, &c. Now, whether a conspiracy *for the purpose* of " doing an act is equivalent to a conspiracy *to do* an act, may be doubted. " In Rex *v.* Nield and Others, the defendants were convicted under a " statute (39 & 40 Geo. 3, c. 106), which makes it penal to enter into agree- " ments *for controlling* certain workmen; the conviction stated the de- " fendants to have entered into an agreement (which was not set out) *for* " *the purpose of controlling;* and this was held insufficient."

Judgment arrested.

1837. *Murphy*, 8 C. & P. 297.

Conspiracy to prevent the levy of a church-rate by libelling the broker employed to levy and by obstructing him by collecting riotous assemblies and by inciting persons to resist him.

Coleridge, J. (in summing up).—" You have been properly told that this " being a charge of conspiracy, if you are of opinion that the acts, though " done, were done without common concert and design between these two " parties, the present charge cannot be supported. On the other hand, " I am bound to tell you, that although the common design is the root of " the charge, it is not necessary to prove that these two parties came to- " gether and actually agreed in terms to have this common design, and to " pursue it by common means, and so to carry it into execution. This is " not necessary, because in many cases of the most clearly established con- " spiracies there are no means of proving any such thing, and neither law

" nor common sense requires that it should be proved. If you find that " these two persons pursued by their acts the same object, often by the " same means, one performing one part of an act, and the other another " part of the same act, so as to complete it, with a view to the attainment " of the object which they were pursuing, you will be at liberty to draw the " conclusion that they have been engaged in a conspiracy to effect that " object. The question you have to ask yourselves is, 'Had they this com- " mon design, and did they purpose it by these common means—the design " being unlawful?' I ought also to tell you that by finding the defendants " guilty you will not (as has been said) affect the right of petitioning. It " is not wrongful to assemble in a public meeting to petition parliament " against that which is alleged to be a public grievance, neither is it un- " lawful to refuse payment of the church-rate in money, and to leave the " collector to obtain payment by taking the goods of the party, as is con- " stantly done in the case of the Quakers; but it is unlawful, by means " like those charged in this indictment, to prevent these rates being levied " on the goods of the party. It is not necessary that it should be proved " that these defendants met to concert this scheme, nor is it necessary that " they should have originated it. If a conspiracy be already formed, and " a person joins it afterwards, he is equally guilty. You are to say whether, " from the acts that have been proved, you are satisfied that these defend- " ants were acting in concert in this matter. If you are satisfied that there " was concert between them, I am bound to say that being convinced of the " conspiracy, it is not necessary that you should find both Mr. Murphy and " Mr. Douglas doing each particular act, as, after the fact of a conspiracy " is once established in your minds, whatever is either said or done by either " of the defendants in pursuance of the common design, is, both in law and " in common sense, to be considered as the act of both.

" You must satisfy yourselves that in this case the acts of the defendants " arose from previous concert and conspiracy, or you should not convict " them."

1844. *O'Connell*, 11 Cl. & F. 155.

The first count for seditiously conspiring to excite disaffection among the subjects and to excite them to hatred and contempt of and seditious opposition to the government and constitution; and to promote ill will between different classes of subjects, and especially between the English and Irish, and to excite disaffection in the army; and to procure unlawful and seditious assemblies for obtaining alterations in the government and laws by show of physical force; and to bring the Irish courts into contempt, &c.; and for certain overt acts for these purposes.

The second count, as the first, but omitting the overt acts.

The third, fourth and fifth counts were variations of the first and second.

The sixth count, that the defendants unlawfully and seditiously intending by means of intimidation and the demonstration of great physical force to procure and effect changes to be made in the government, laws and constitution, unlawfully and seditiously did conspire, &c. to cause and procure, &c. divers subjects of the queen to meet and assemble together in large numbers at various times and at different places for the unlawful and seditious purpose of obtaining by means of intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes in the government, laws and constitution.

The seventh count as the sixth, but added—"and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland."

The eighth count stated an intent to bring the tribunals of justice into

contempt, and to cause the subjects to withdraw their differences from the said tribunals.

The ninth count stated an intent to assume and usurp the prerogative of the crown in the establishment of courts for the administration of the law.

The tenth count stated an intent to bring into disrepute the tribunals for the administration of justice.

The eleventh count, that the defendants, intending by means of intimidation and demonstration of physical force, &c. by causing large numbers of persons to meet and assemble, and by means of seditious and inflammatory speeches to be delivered to the said persons, and by means of publishing divers unlawful and seditious writings, to intimidate the lords spiritual and temporal and commons of the parliament of the united kingdom, and thereby to effect changes in the laws and constitution, unlawfully and seditiously did conspire, &c. to cause large numbers of persons to meet together at divers places and times, and by means of seditious speeches, of publishing to the subjects of the queen unlawful and seditious writings, &c. to intimidate the lords spiritual and temporal and the commons, and thereby to effect and bring about changes and alterations in the laws and constitution.

Upon writ of error in the House of Lords, the question was put to the judges:—"Are all or any, and if any, which, of the counts in the indictment bad in law? so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered upon them?" The judges thought that the sixth and seventh counts were insufficient, but that all the other counts sufficiently disclosed objects for which it was criminal to combine.

Tindal, C. J., delivered the opinion of the judges as follows:—"My "Lords, the answer to the first question will depend upon the consideration, "whether all the counts of the indictment are framed with that proper "and convenient certainty, with respect to the substance of the charge of "conspiracy, which the law requires; for, undoubtedly, if any of such "counts are framed in so loose, uncertain or inapt a manner, as that the "defendants might have availed themselves of the insufficiency of the "indictment upon a demurrer, there is nothing to prevent them from having "the same advantage of the objection upon a writ of error. The crime of "conspiracy is complete if two, or more than two, should agree to do an "illegal thing; that is, to effect something in itself unlawful, or to effect, "by unlawful means, something which in itself may be indifferent, or even "lawful. That it was an offence known to the common law, and not first "created by the 33 Edw. 1, is manifest. That statute speaks of conspiracy "as a term at that time well known to the law, and professes only to be 'a "definition of conspirators.' It has accordingly been always held to be "the law, that the gist of the offence of conspiracy is the bare engagement "and association to break the law, whether any act be done in pursuance "thereof by the conspirators or not. (R. *v.* Best, R. *v.* Edwards.) No "serious objection appears to have been made at your Lordships' bar "against the sufficiency of any of the counts prior to the sixth. Indeed, "there can be no question but that the charges contained in the first five "counts do amount, in each, to the legal offence of conspiracy, and are "sufficiently described therein. There can be no doubt but that the agree-"ing of divers persons together to raise discontent and disaffection amongst "the liege subjects of the Queen, to stir up jealousies, hatred and ill-will "between different classes of her Majesty's subjects, and especially to pro-"mote amongst her Majesty's subjects in Ireland feelings of ill-will and "hostility towards her Majesty's subjects in other parts of the United "Kingdom, and especially in England—which charges are found in each "of the first five counts which first occur in the indictment—do form a "distinct and definite charge in each, against the several defendants, of an

"agreement between them to do an illegal act; and it therefore becomes
" unnecessary to consider the other additional objects and purposes alleged
" in some of those respective counts to have been comprised within the
" scope of the agreement of the several defendants. With respect, how-
" ever, to the sixth and seventh counts, in the form in which they stand
" upon this record, we all concur in opinion that they do not state the
" illegal purpose and design of the agreement entered into between the
" defendants with such proper and sufficient certainty as to lead to the
" necessary conclusion that it was an agreement to do an act in violation
" of the law. Each of these two counts does in substance state the agree-
" ments of the defendants to have been 'to cause and procure divers sub-
" jects to meet together in large numbers, for the unlawful and seditious
" purpose of obtaining, by means of the intimidation to be thereby caused,
" and by means of the exhibition and demonstration of the great physical
" force at such meetings, changes in the government, laws and constitution
" of the realm.' Now, though it may be inferred from this statement, that
" the object of the defendants was probably illegal, yet it does not appear
" to us to be so alleged with sufficient certainty. The word 'intimidation'
" is not a technical word: it is not *vocabulum artis*, having a necessary
" meaning in a bad sense; it is a word in common use, employed on this
" occasion in its popular sense; and in order to give it any force, it ought
" at least to appear from the context what species of fear was intended, or
" upon whom such fear was intended to operate. But these counts contain
" no intimation whatever upon what persons this intimidation was in-
" tended to operate; it is left in complete uncertainty whether the inti-
" midation was directed against the peaceable inhabitants of the sur-
" rounding places, against the subjects of the Queen dwelling in Ireland in
" general, against persons in the exercise of public authority there, or even
" against the legislature of the realm. Again, the mere allegation that
" these changes were to be obtained by the exhibition and demonstration of
" physical force, without any allegation that such force was to be used, or
" threatened to be used, seems to us to mean no more than the mere
" display of numbers, and consequently to carry the matter no further.
" Applying the same principle and mode of reasoning to the consideration
" of the eighth, ninth and tenth counts of the indictment, we all concur in
" opinion that the object and purpose of the agreement entered into by the
" defendants, as disclosed upon those counts, is an agreement for the per-
" formance of an act, and the attainment of an object, which is a violation
" of the laws of the land. We think it unnecessary to state reasons in
" support of the opinion, that an agreement between the defendants to
" diminish the confidence of her Majesty's subjects in Ireland in the general
" administration of the law therein, or an agreement to bring into hatred
" and disrepute the tribunals by law established in Ireland for the admi-
" nistration of justice, are each and every of them agreements to effect
" purposes in manifest violation of the law. Upon the sufficiency of the
" eleventh count, no doubt whatever has been raised."

Lord Denman doubted whether the counts relating to contempts of the courts were good:—"I am by no means clear that there is anything illegal
" involved in exciting disapprobation of the courts of law, for the purpose
" of having other courts substituted more cheap, efficient, and satisfactory."

Lord Campbell said,—"A conspiracy to effect an unlawful purpose, or
" to effect a lawful purpose by unlawful means, is by the law of England
" an indictable offence: and it is fit that if several persons deliberately
" plot mischief to an individual or to the state, they should be liable to
" punishment, although they may have done no act in execution of their
" scheme. Where they have actually done what they intended to do, it
" may be more proper to prosecute them for their illegal acts; but in point
" of law, they remain liable for the offence of entering into the conspiracy.

" The first five counts clearly charge the defendants with having conspired " together to effect unlawful purposes. The fifth count was strongly " objected to; but I consider that any person who deliberately attempts to " promote feelings of ill-will and hostility between different classes of her " Majesty's subjects—to make the English be hated by the Irish, or the " Irish be hated by the English—is guilty of a most culpable proceeding; " and that, if several combine to do so, they commit a misdemeanor for " which they may be indicted and punished. I have entertained some " doubt whether the eighth count does more than charge a design to show " the inefficiency of certain tribunals, that others more efficient may be " substituted for them by the legislature—in which case it would be insuf- " ficient; although a conspiracy generally to bring into discredit the " administration of justice in the country, with a view to alienate the " people from the government, would certainly be a misdemeanor."

Other points in this case were—

1. That where a count charged an agreement for several purposes, a verdict was bad which found that a defendant had agreed with A. for some of the purposes, and with B. for others; for this was a finding of two agreements, where the count charged only one.

2. That where a count charged an agreement for several purposes, a verdict was bad for repugnancy which found three defendants guilty generally, and others guilty as to some only of the purposes; for the finding as to the three implied that all had agreed with them as to all the purposes.

3. That the general judgment on several counts, some of which were bad, was erroneous. (But in Mulcahy's Case, 1868, it was held in D. P., in a case of treason felony, that a verdict and judgment on a count were good where the count contained some sufficient overt acts, although it also averred others which were insufficient.)

1870. *Warburton*, L. R., 1 C. C. 274.

General count for conspiracy by divers subtle means and devices to cheat and defraud L. Proof that the prisoner was partner with L., and conspired with P. by means of false accounts to pretend that the firm owed money to P., with intent that such money when paid to P. should be divided between P. and the prisoner, and that L. should so be defrauded. The conspiracy was before the passing of the Recorder's Act, 31 & 32 Vict. c. 116, for protection of partners. It was objected that the prisoner's act, though immoral, was not illegal, that L. would have had no remedy at law against the prisoner, nor could the prisoner be indicted either for larceny or for false pretences (Evans, 32 L. J., M. C. 38; L. & C. 252); and that an act for which there is merely an equitable remedy is not an illegal act within the meaning of the law of conspiracy. But the C. C. C. R. held the conviction good.

Cockburn, C. J., " Even assuming that no action or indictment would lie " for such acts, the acts are wrongful nevertheless, and there is a remedy, " viz., by proceedings in equity."

Cockburn, C. J.—" It has been doubted sometimes whether the law of " England does not go too far in treating as conspiracies agreements to do " acts which, if done, would not be criminal offences. This question does " not, however, arise here, as no one would wish to restrict the law so that " it should not include a case like the present. It is sufficient to constitute " a conspiracy if two or more persons combine by fraud and false pretences " to injure another. It is not necessary in order to constitute a conspiracy " that the acts agreed to be done should be acts which if done would be " criminal. It is enough if the acts agreed to be done, although not " criminal, are wrongful, *i. e.*, amount to a civil wrong. Here, there was " undoubtedly an agreement with reference to the division of the partner-

" ship property or of the partnership profits. It is equally clear that the " agreement was to commit a civil wrong, because the agreement was to " deprive the prisoner's partner by fraud and false pretences of his just " share of the property or profits of the partnership. A civil wrong was " therefore intended to Lister. The facts of this case thus fall within the " rule that when two fraudulently combine, the agreement may be criminal, " although if the agreement were carried out no crime would be committed, " but a civil wrong only would be inflicted on a third party. In this case " the object of the agreement was, perhaps, not criminal. It is not neces- " sary to decide whether or not it was criminal; it was, however, a con- " spiracy, as the object was to commit a civil wrong by fraud and false " pretences, and I think that the conviction should be affirmed."

Channell and Cleasby, BB., Keating and Brett, JJ., concurred.

APPENDIX III.

LISTS OF CASES.

[NOTE.—This Appendix does not include the ancient cases on the writ of conspiracy, nor the cases on treason, except such cases of either of these kinds as are of some importance for the general law of conspiracies and criminal agreements.]

A List of the Cases on Conspiracy chronologically arranged.

1350. Anon.
1354. 27 Edw. 3, Art. of Inquest.
1354. Anon.
1356. Anon.
1369. The Lumbard's Case.
1574. Sydenham *v.* Keilaway.
1597. Anon.
1599. Ameridcth.
1600. Blunt.
1607. Lord Gray of Groby.
1608. Floyd *v.* Barker.
1611. The Poulterers' Case.
1612. Ashley.
1613. Scarlet.
1616. Bagg.
1629. Tailor and Towlin.
1636. Midwinter and Scrogg.
1663. Timberley and Childe (or Kimberty).
1665. Starling.
1671. Opie.
1674. Thody.
1678. Armstrong.
1680. Blood.
1682. Lord Grey. (See *Note*, p. 106.)
1685. Salter.
1688. Grimes.
1697. Thorp.
1698. Anon.
1699. Savile *v.* Roberts.
1704. Orbell.
1704. Daniell.
1705. Callingwood.
1705. Maccarty. (See *Note*, p. 106.)
1705. Best.
1719. Cope.
1719. Kinnersley and Moore.
1721. Journeymen Tailors of Cambridge.
1725. Edwards.
1730. Bryan.
1744. Robinson.
1745. Niccols.
1752. Chetwynd *v.* Lindon.
1756. M'Daniel.
1758. Norris.
1759. Herbert.
1760. Spragg.
1761. Wheatley.
1762. Rispal.
1763. Parsons.
1763. Delaval.
1767. Tarrant.
1769. Vertue *v.* Lord Clive.
1775. Leigh.
1780. Young.
1782. Hevey.
1783. Eccles.

1783. Compton.
1788. Fowler.
1789. Pasley *v.* Freeman.
1792. Parkhouse.
1793. Prisoners' Case.
1794. Hardy.
1794. Horne Tooke.
1795. Tanner.
1796. Stone.
1796. Mawbey.
1799. Hammond.
1802. Marks.
1802. Steventon.
1803. Brisac.
1804. Locker.
1804. Salter.
1805. Nield.
1807. Claridge *v.* Hoare.
1808. Roberts.
1809. Pollman.
1809. Stratton.
1809. Teal.
1809. Clifford *v.* Brandon.
1811. Turner.
1814. Askew.
1814. De Berenger.
1814. Wade *v.* Broughton.
1816. Pywell.
1816. Brodribb.
1817. Watson.
1818. Kroehl.
1818. Hilbers.
1818. Gill.
1819. Ferguson.
1819. Roberts *v.* Roberts.
1819. Anon.
1820. The Queen's Case.
1820. King.
1820. Hunt.
1822. Ridgway.
1823. Murray.
1824. Whitehead.
1824. Thomas.
1825. Hollingberry.
1826. Serjeant.
1826. Cooke.
1826. Bushell *v.* Barrett.
1827. Mott.
1827. Wakefield.
1830. Maudsley.
1831. Fowle.
1832. Bykerdike.
1832. Jones.
1833. Ford and Aldridge.
1833. Bloomfield *v.* Blake.
1833. Levi *v.* Levi.
1834. Richardson.
1834. Biers.
1834. Seward.
1834. Ball.
1834. Lovelass.
1834. Dixon.
1836. Hamilton.
1837. Murphy.
1839. Peck.
1839. Frost.
1839. Vincent.
1840. Shellard.
1841. Steel.
1842. Parker.
1842. Harris.
1843. Gregory *v.* Duke of Brunswick.
1843. Kenrick.
1844. Blake.
1844. King.
1844. O'Connell.
1844. Ward.
1845. Jacobs.
1846. Gompertz.
1847. Sydserff.
1847. Selsby.
1848. Brittain.
1848. Button.
1848. Lacey.
1849. Wright.
1851. Mears.
1851. Thompson.
1851. Hewitt.
1851. Rowlands.
1851. Duffield.
1852. Whitehouse.
1852. Rycroft.
1852. Read.

1852. Hamp.
1852. Ahearne.
1853. Yates.
1853. Lumley *v.* Gye.
1854. Carlisle.
1856. Hilton *v.* Eckersley.
1856. Bullock.
1857. Stapylton.
1857. Hall.
1858. Timothy.
1858. Esdaile.
1858. Brown.
1858. Bernard.
1859. Absolon.
1859. Perham.
1860. Hudson.
1861. Walsby *v.* Anley.
1863. O'Neill *v.* Longman.
1863. O'Neill *v.* Kruger.
1864. Latham.
1864. Knowlden.
1864. Kohn.
1864. Howell.
1865. Barry.
1865. Burch.
1866. Shelbourne *v.* Oliver.
1866. Wood *v.* Bowron.
1867. Skinner.
1867. { Druitt.
1867. { Bailey.
1867. Hornby *v.* Close.
1868. Desmond.
1868. Sheridan.
1868. Springhead Co. *v.* Riley.
1868. Mulcahy.
1869. Shepherd.
1869. Lewis.
1869. Gurney.
1869. Farrer *v.* Close.
1870. Warburton.
1871. Boulton.
1871. Taylor.
1872. Bunn.

A List of the Cases on Conspiracy alphabetically arranged, with the References.

Absolon, 1859, 1 F. & F. 498.
Ahearne, 1852, 6 Cox, 6.
Amerideth, 1599, Moore, 562.
Anon. 1350, 24 Edw. 3, p. 75 (99).
Anon, (27 Edw. 3), 1354, Art. of Inq., 27 Ass. p. 138 *b*, pl. 44.
Anon. 1356, 29 Ass. p. 166, pl. 45.
Anon. 1597, 3 Inst. 196.
Anon. 1698, 12 Mod. 248.
Anon. 1819, 1 Chit. Rep. 698.
Armstrong, 1678, 1 Ventr. 304.
Ashley, 1612, Moore, 816; 12 Rep. 91.
Askew, 1814, 3 M. & S. 9.
Bagg, 1616, 11 Rep. 93 *b*; 1 Roll. Rep. 225.
Bailey, 1867, 10 Cox, 592; 16 L. T. (N. S.) 855, 859.
Ball, 1834, 6 C. & P. 563.
Barry, 1865, 4 F. & F. 389.
Bernard, 1858, 1 F. & F. 240.
Best, 1705, 2 Ld. Raym. 1167; 1 Salk. 174; 6 Mod. 185.
Biers, 1834, 1 A. & E. 327.
Blake, 1844, 6 Q. B. 126.
Blood, 1680, 2 T. Raym. 417.
Bloomfield *v.* Blake, 1833, 6 C. & P. 75.
Blunt, 1600, 1 St. Tr. 411.
Boulton, 1871, 12 Cox, 87.
Brisac, 1803, 4 East, 164.
Brittain, 1848, 3 Cox, 76.
Brodribb, 1816, 6 C. & P. 571, n.

Bryan, 1730, 2 Stra. 165.
Brown, 1858 (*see* Esdaile).
Bullock, 1856, Dears. 653.
Bunn, 1872, "Morning Advertiser," 20 Dec. 1872; "Times," 20 Dec. 1872.
Burch, 1865, 4 F. & F. 407.
Bushell *v.* Barrett, 1826, Ry. & M. 439.
Button, 1848, 11 Q. B. 929.
Bykerdike, 1832, 1 Moo. & Rob. 179.
Callingwood, 1705, 2 Ld. Raym. 1116.
Carlisle, 1854, Dears. 337.
Chetwynd *v.* Lindon, 1752, 2 Vesey, sen. 450.
Claridge *v.* Hoare, 1807, 14 Ves. 65.
Clifford *v.* Brandon, 1809, 2 Camp. 358.
Compton, 1783, Cald. 246.
Cooke, 1826, 5 B. & C. 538.
Cope, 1719, 1 Stra. 144.
Daniell, 1704, 6 Mod. 99; 1 Salk. 380.
De Berenger, 1814, 3 M. & S. 67.
Delaval, 1763, 3 Burr. 1434; 1 W. Bl. 410, 439.
Desmond, 1868, 11 Cox, 146.
Dixon, 1834, 6 C. & P. 601.
Druitt, 1867 (*see* Bailey).
Duffield, 1851 (*see* Rowlands).
Eccles, 1783, 1 Leach, 274; *see also* 13 East, 230, n.; Willes, Rep. 583, n.
Edwards, 1725, 2 Stra. 707; 1 Sess. Ca. 836; 8 Mod. 320.
Esdaile, 1858 (or Brown), 1 F. & F. 213; 7 Cox. 442.
Farrer *v.* Close, 1869, L. R., 4 Q. B. 602.
Ferguson, 1819, 2 St. 489.
Floyd *v.* Barker, 1608, 12 Rep. 23.
Ford and Aldridge, 1833, 1 N. & M. 776.
Fowle, 1831, 4 C. & P. 592.
Fowler, 1788, 1 East, 461, 462.
Frost, 1839, 9 C. & P. 129.
Gill, 1818, 2 B. & A. 204.
Gompertz, 1846, 9 Q. B. 825.
Gray of Groby (Lord), 1607, Moore, 788.
Gregory *v.* Duke of Brunswick, 1843, 1 C. & K. 24; 6 M. & G. 205.
Grey (Lord), 1682, 2 St. Tr. 519 (9 St. Tr. 127).
Grimes, 1688, 3 Mod. 220.
Gurney, 1869, 11 Cox. 414.
Hall, 1857, 1 F. & F. 33.
Hamilton, 1836, 7 C. & P. 448.
Hammond, 1799, 2 Esp. 719.
Hamp, 1852, 6 Cox, 167.
Hardy, 1794, 24 St. Tr. at 438.
Harris, 1842, C. & M. 661, n.
Herbert, 1759, 1 East, P. C. 461.
Hevey, 1782, 2 East, P. C. 858.
Hewitt, 1851, 5 Cox, 162.
Hilbers, 1818, 2 Chit. Rep. 163.
Hilton *v.* Eckersley, 1856, 6 E. & B. 47; 25 L. J., Q. B. 199, C. Sc.
Hollingberry, 1825, 4 B. & C. 329.
Hornby *v.* Close, 1867, L. R., 2 Q. B. 153.
Horne Tooke, 1794, 25 St. Tr. at 127.
Howell, 1864, 4 F. & F. 160.
Hudson, 1860, 29 L. J., M. C. 145; Bell, 263.
Hunt, 1820, 3 B. & A. 566.
Jacobs, 1845, 1 Cox, 173.
Jones, 1832, 4 B. & Ad. 345.
Journeymen Tailors of Cambridge, 1721, 8 Mod. 10.
Kenrick, 1843, 5 Q. B. 49.
Kimberty (*see* Timberley), 1663.
King, 1844, 7 Q. B. 782.
King, 1820, 2 Chit. Rep. 217.
Kinnersley and Moore, 1719, 1 Stra. 193.
Knowlden, 1864, 9 Cox, 483.
Kohn, 1864, 4 F. & F. 68.
Kroehl, 1818, 2 St. 343.
Lacey, 1848, 3 Cox, 522.
Latham, 1864, 9 Cox, 516.

Leigh, 1775, in 1 C. & K. 28, n., & 2 Camp. 372, n; 6 Wentw. Pl. 443.
Levi *v.* Levi, 1833, 6 C. & P. 239.
Lewis, 1869, 11 Cox, 404.
Locker, 1804, 5 Esp. 107.
Lovelass, 1834, 6 C. & P. 596.
Lumbard's Case, 1369, 43 Ass. 276 (38).
Lumley *v.* Gye, 1853, 22 L. J., Q. B. at 471.
Maccarty, 1705, 2 Ld. Raym. 1179; 6 Mod. 301; 1 Salk. 286.
Marks, 1802, 3 East, Rep. 157.
Maudsley, 1830, 1 Lew. 51.
Mawbey, 1796, 6 T. R. 619; 4 Wentw. Pl. 125.
M'Daniel, 1756, Fost. 130; 1 Leach, 44.
Mears, 1851, 2 Den. 79.
Midwinter *v.* Scrogg, 1636, in 1 Keb. 656.
Mott, 1827, 2 C. & P. 521.
Mulcahy, 1868, L. R., 3 E. & I. App. 306.
Murphy, 1837, 8 C. & P. 297.
Murray, 1823, 1 Burn's J. (30th ed.), 976.
Niccols, 1745, 2 Stra. 1227.
Nield, 1805, 6 East, 417.
Norris, 1758, 2 Ken. 300.
O'Connell, 1844, 11 Cl. & F. 155.
O'Neill *v.* Kruger, 1863, 4 B. & S. 389.
O'Neill *v.* Longman, 1863, 32 L. J., M. C. 259; 9 Cox, 360; 4 B. & S. 376.
Opie, 1671, 1 Wms. S. 300 *l.*
Orbell, 1704, 6 Mod. 42.
Parker, 1842, 3 Q. B. 292.
Parkhouse, 1792, 1 East, P. C. 462.
Parsons, 1763, 1 W. Bl. 392.
Pasley *v.* Freeman, 1789, 3 T. R. at p. 58.
Peck, 1839, 9 A. & E. 686.
Perham, 1859, 5 H. & N. 30; 29 L. J., M. C. 31, 33.
Pollman, 1809, 2 Camp. 230.
Poulterers' Case, 1611, 9 Rep, 55; Moore, 814.
Prisoners' Case, 1793, Hawk. 1, 72, 2.
Pywell, 1816, 1 St. 402.
Queen's Case, 1820, 2 B. & B. 303.
Read, 1852, 6 Cox, 77, n.
Richardson, 1834, 1 M. & Rob. 402.
Ridgway, 1822, 5 B. & A. 527.
Rispal, 1762, 3 Burr. 1320; 1 W. Bl. 368.
Roberts, 1808, 1 Camp. 399.
Roberts *v.* Roberts, 1819, 3 B. & A. 367.
Robinson, 1744, 1 Leach, 37.
Rowlands, 1851, 2 Den. 364; 5 Cox, 404, 460; 17 Q. B. 671.
Rycroft, 1852, 6 Cox, 76.
Salter, 1685, 2 Show. 456.
Salter, 1804, 5 Esp. 125.
Savile *v.* Roberts, 1699; 1 Ld. Raym. 374; 5 Mod. 394, 405; 1 Salk. 13; Carth. 416.
Scarlet, 1613, 12 Rep. 98.
Selsby, 1847, 5 Cox, 495, n.
Serjeant, 1826, 1 R. & M. (N. P.) 352.
Seward, 1834, 1 A. & E. 706.
Shelbourne *v.* Oliver, 1866, 13 L. T., N. S. 630.
Shellard, 1840, 9 C. & P. 277.
Shepherd, 1869, 11 Cox, 325.
Sheridan, 1868, "Leeds Mercury," 13 Aug. 1868.
Skinner, 1867, 10 Cox, 493.
Spragg, 1760, 2 Burr. 993, 1027.
Springhead Co. *v.* Riley, 1868, L. R., 6 Eq. 551.
Stapylton, 1857, 8 Cox, 69.
Starling, 1665, 1 Sid. 174; 1 Keb. 650, 655; 1 Lev. 125.
Steel, 1841, 2 Moo. 246.
Steventon, 1802, 2 East, Rep. 362.
Stone, 1796, 6 T. R. 527.
Stratton, 1809, 1 Camp. 549, n.

Sydenham *v.* Keilaway, 1574, in Cro. Jac. 8.
Sydserff, 1847, 11 Q. B. 245, Cam. Sc.
Tailor and Towlin, 1629, Godb. 444.
Tanner, 1795, 1 Esp. 304.
Tarrant, 1767, 4 Burr. 2106.
Taylor, 1871, 25 L. T. (N. S.) 75.
Teal, 1809, 11 East, 307.
Thody, 1674, 1 Ventr. 234.
Thomas, 1824, 1 C. & P. 472.
Thompson, 1851, 16 Q. B. 832.
Thorp, 1697, 5 Mod. 221.
Timberley and Childe, 1663 (or Kimberty), 1 Sid. 68; 1 Lev. 62; 1 Keb. 203; 1 Keb. 254.
Timothy, 1858, 1 F. & F. 39.
Turner, 1811, 13 East, 228.
Vertue *v.* Lord Clive, 1769; 4 Burr. 2472.
Vincent, 1839, 9 C. & P. 91.
Wade *v.* Broughton, 1814, 3 Ves. & B. 172; S. P. 1 Ves. & B. 292.
Wakefield, 1827, 2 Lew. 1.
Walsby *v.* Anley, 1861, 3 E. & E. 516; 30 L. J., M. C. 121.
Warburton, 1870, L. R., 1 C. C. 274.
Ward, 1844, 1 Cox, 101.
Watson, 1817, 2 St. 116.
Wheatley, 1761, 2 Burr. 1127; 1 W. Bl. 273.
Whitehead, 1824, 1 C. & P. 67.
Whitehouse, 1852, 6 Cox, 38.
Wood *v.* Bowron, 1866, L. R., 2 Q. B. 21.
Wright, 1849, 14 Q. B. 148.
Yates, 1853, 6 Cox, 441.
Young, 1780 (?), cited in 1788, Lynn, 2 T. R. 733.

Note.—The cases of Lord Grey (1682) and Maccarty (1705) are inserted in these lists of cases because they are cited by East and other writers as cases of conspiracy But Maccarty's Case is in truth only an example of an indictment for a cheat before the rule was established that private cheats were not indictable at common law (see *sup.* p. 10). The indictment is set out in 2 Ld. Raym. 1179, and it contains nothing about conspiracy or agreement, but only the word *insimul*, which is never used to describe conspiracy, but only a joint crime. In Lord Grey's Case the word "conspirantes" occurs merely by way of aggravation in one of the inducements, and nothing is said about conspiracy throughout the case except in the recital of the indictment by the counsel who opened it. The direction of the L. C. J. Pemberton plainly shows that the case was regarded merely as a case of abduction and procurement of the then crime of adultery. Precedents of indictments against sole defendants for adultery will be found in Tremayne. It is true that there was not in law any criminal abduction, for the lady was seventeen, and not an heir apparent nor a ward of court: but the true meaning of "guardianship by nature" had not then been established by Hargrave (on Co. Lit. 88 *b*).

Attorney General. "This case, my lord, is in the nature of a ravishment of ward, for it is for taking a young lady out of the tuition and custody of her father, who is her guardian by nature."

L. C. J. Pemberton. "Look you, gentlemen of the jury, here is an infor-

mation on the behalf of the king against my Lord Grey and the other defendants; and it doth set forth that my Lord Grey having married one of the daughters of the Earl of Berkeley, and having opportunity of coming to the Earl of Berkeley's house, he did unlawfully solicit the Lady Henrietta, another daughter of the Earl of Berkeley's, a young lady, to unlawful love; and that he did entice her from her father's house; and that he did cause her to be conveyed away from thence against her father's consent; and that he did unlawfully use her company afterwards in a very ill manner; and this, gentlemen, is the substance of the information; in truth, it is laid, that he did live in fornication with her. * * * Now, then, the question before you is, whether there were any such unlawful solicitation of this lady's love; and whether there was any inveiglement of her to withdraw herself and run away from her father's house without his consent; and whether my Lord Grey did at any time frequent her company afterwards."

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.